MISSISSIPPI LAW JOURNAL

PACKAGE PATENT LICENSING: A PRACTICAL ANALYSIS

Ernest B. Lipscomb, III

THE SOCIAL SECURITY ADMINISTRATION VERSUS THE LAWYERS . . . AND POOR PEOPLE TOO—PART I

Robert M. Viles

POPULATION AND POVERTY:
THE ECONOMIC EFFECT OF POPULATION IMBALANCE

L. V. Watkins, Jr.

POPULATION MIGRATION EFFECTS ON MISSISSIPPI POVERTY

Jon P. Thames

May 1968

VOLUME XXXIX NUMBER 3

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Entered as second class matter, November 25, 1936, at the Post Office at University, Mississippi, and Nashville, Tennessee, under the Act of Congress of March 3, 1879.
Published in December, March, May, and October

$5.00 Per Annum $1.80 Per Current Number
EDITORIAL AND BUSINESS OFFICE, UNIVERSITY, MISSISSIPPI

Mississippi Law Journal

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VOLUME XXXIX MAY 1968 NUMBER 3

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Mississippi Law Journal

VOLUME XXXXI MAY 1968 NUMBER 3

PACKAGE PATENT LICENSING: A PRACTICAL ANALYSIS*

*Ernest B. Lipscomb, III***

"Altruism is a virtue not usually ascribed to Licensors."[1]

It is the purpose of this paper to present the problems facing patent licensors in the area of package patent licensing. The approach utilized in a specific package licensing situation will be contrasted with existing case law both as to the judicial decisions and the economical aspects involved.

I. Introduction

Many areas of today's technology are so intensely complex that invention in these areas may only be carried out by research departments of corporations, who not only have excellent research facilities, but also are willing to spend large sums of money in research.[2] Research-engaged corporations, both large and small, obtain numerous patents and extensive know-how in various narrow areas of technology. Hesitancy on the part of corporate management to place the necessary money into research because of uncertain results causes most of the existing economic difficulties. Research efforts are therefore restrained within sound economical principles as, "Innovative activity should be subsidized as much and no more than is necessary to attract to that

* After this paper was written, Wells Surveys v. Perfolog, 154 U.S.P.Q. 313 (1967) was decided and will be of interest to the reader.

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[1] Technograph Printed Circuits, Ltd. v. Bendix Corp., 218 F. Supp. 1, 49 (D. Md. 1963).

[2] Since 1882 when corporations owned only 8% of the patents, the percent of corporate owned patents has increased to 53% by 1955. Ellis, Patent Licensing § 466 (rev. ed. 1958).

activity those inputs which, if invested in any other activity, would yield a product of lesser social value."[3]

In order to efficiently and economically expedite knowledge in a specific field, a common practice to license all or a substantial portion of a company's patents in that area together has developed—hence the name *package licensing*. More accurately defined, a package license may include more than one or all of the licensor's patents, patent applications, or future patents relating to similar areas of technology for a specific period of time in consideration for the payment of a uniform royalty payment independent of the number of patents actually used.[4]

The grouping of patents in a package appears simple enough and, as will be shown, is economically sound, but the practitioner must be wary of trespassing contract laws, patent laws, and the antitrust laws, including both the Sherman and Clayton Acts. Only a few cases in the area of package licensing have been decided and most of those only recently;[5] however, these decisions, mostly appellate court cases, have stabilized package licensing enough to allow the practitioner to proceed on sound footing. Historically speaking, package licensing cases are so relatively new that each case is pertinent in its own right and will be set forth in its appropriate position.[6] Economic benefits of package licensing include encouraging its frequent use to avoid troublesome questions of infringement, complex bookkeeping, the difficulty of determining which patents cover the present and future needs of the licensee, cost differences, and similar practical considerations.[7] In contradiction to the economic benefits obtainable by using package licensing, a possible vice exists in the potential to use a package license to coerce licensees to accept the license under one patent as a condition of acceptance for a license under another patent as an entire package, which is contrary to the antitrust laws.[8]

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[3] This is the classic economic criterion for optimal allocation. Boulding, ECONOMIC ANALYSIS, 168-172 (3d ed. 1958).

[4] *See* Comment, *Validity of Patent License Provisions Requiring Payment of Post-Expiration Royalties*, 65 COL. L. REV. 1256, 1264 (1965).

[5] The earliest Supreme Court decision directly affecting package licensing was Ethyl Gasoline Corp. v. United States, 309 U. S. 436 (1940).

[6] For the twenty-year period 1944-1964 only four package licensing cases reached the appellate level; seven others were tried in District Courts, and two others were tried in the state courts. American Bar Association, Section of Patent, Trademark & Copyright Law, SUMMARY OF PROCEEDINGS 1965 at 204-205.

[7] REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAW, U. S. Government Printing Office (1955) at 239.

[8] Antitrust prohibitions will be discussed with each of the separately treated provisions of the accompanying example package license.

Considerations in a package license to be discussed hereinafter include: the licensing provision, including both existing patents and future patents, the royalty rate provision, and the term and termination provisions. Each of the named provisions of the package license will be discussed in detail, both as to their economical and judicial aspects. A complete copy of the example package license is affixed to this paper as Appendix A for the reader's convenience.

II. The License Provision

The first package license provision for discussion grants either an exclusive or non-exclusive license to either make or use or sell (or all three)[9] under certain of the licensor's patents, patent applications, or future patents. Note the reference to Group Rate Basis or Individual Rate Basis for payment of royalties, a feature which is believed unique and which will be discussed later.

> X Company grants to ABC, subject to the conditions and agreements hereinafter recited, a non-exclusive license, under the claims of each of the Licensed Patents, to manufacture in the United States only, and use and sell, product X and product XA in which, or in the manufacture of which, any one or more of such Licensed Patents are used. The license under each of the Licensed Patents shall be deemed to be separate and distinct from the license under any other Licensed Patents and, as hereinafter provided, ABC shall have the right to surrender and terminate its license under any one or more of the Licensed Patents without affecting its license under any other Licensed Patent.
>
> Any and all other United States patents relating to product X or product XA acquired after the date of this agreement or issuing after the date of this agreement, and owned by X company, or under which X company acquires the right to sublicense after the date of this agreement (all of such patents being hereinafter referred to as "Future Patents") shall be automatically included under this agreement without additional royalty payment when the Group Rate Basis for payment of royalties is in effect. All of such automatically licensed Future Patents, and any other Future Patents, under which a license is acquired by ABC when the Individual Rates Basis for payment of royalties is in effect and hereinafter referred to as "Additional Licensed Patents". ABC shall have the right to surrender and terminate its license under any one or more of the Additional Licensed Patents without affecting its license under any other Licensed Patent or other Additional Licensed Patent.[10]

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[9] The right to make, use, or sell may be granted or conferred separately by the patentee. Adams v. Burke, 84 U. S. (17 Wall.) 453, 456 (1873).

[10] In Binks Mfg. Co. v. Ransburg Electro-Coating Corp., 122 U.S.P.Q. 74, 88 (S.D. Ind. 1959) the court made no distinction as to which patents would be used among those licensed.

Legal justification for the inclusion of patent applications and future patents in a package license can be found in *Automatic Radio Mfg. Co.* v. *Hazeltine Research.*[11] The package license agreement to Automatic Radio, as in the example, called for a non-exclusive license in a crowded technological area, and the agreement covered a group of 570 patents, 200 patent applications, and future patents for the term of the license. The Supreme Court affirmed the decision of the First Circuit Court of Appeals that grouping (packaging) patents was a convenient method designed by the parties to avoid the necessity of determining whether each type of petitioner's product embodied any of the numerous Hazeltine patents despite the fact that some of the Hazeltine patents were never used by Automatic Radio.[12]

Much has been said against the Hazeltine ruling to the effect that such an arrangement constitutes a tying clause and therefore is either a patent misuse[13] or antitrust violation.[14] Authority for holding that a patent must not be tied to another patent goes back to 1940 in *Ethyl Gasoline Corporation* v. *United States,*[15] wherein it was found improper to force a licensee to take a license to unwanted patents—hence the provision in the example license for termination of the license with respect to any patent (or future patent) at the licensee's will. Although the above authorities appear to be against grouping together patents that are mutually exclusive in a package, economics makes packaging mandatory when one product requires the use of more than one patent for its manufacture, *i.e.*, blocking patents. The Ninth Circuit Court of Appeals in *International Manufacturing Company* v. *Landon, Inc.*[16] stated that "it is not an unlawful tying arrangement for a seller to include several items in a single mandatory package license when the items may reasonably be considered to constitute parts of a single distinct product."[17] The example package licensing provision clearly places that provision within the legal principles set forth in *Hazeltine,*[18] *Ethyl Gasoline,*[19] and *International Mfg.*[20] It is therefore clear that the grant-

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[11] 339 U.S. 827 (1950). Hazeltine, however, gave no right to surrender individual patents.

[12] *Id.* at 834.

[13] United States v. Loew's Inc., 371 U.S. 38 (1962). Although this case did not directly involve patents, the cases cited were patent misuse and the situations pertained to tie-in provisions. See generally, Frost, *Tying Clauses and Package Licensing,* 28 U. Pitt. L. Rev. 207 (1966).

[14] Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953).

[15] Ethyl Gasoline Corp. v. United States, 309 U.S. 436 (1940).

[16] 336 F.2d 723 (1964).

[17] *Id.* at 730.

[18] 339 U.S. 827 (1950).

[19] Ethyl Gasoline Corp. v. United States, 309 U.S. 436 (1940).

[20] International Mfg. Co. v. Landon, Inc., 336 F.2d 723 (1964).

ing of a license under a group of patents, without more, may not violate the antitrust laws or constitute a patent misuse.[21] The example licensing provision is economically advantageous because it permits the parties to avoid the bothersome necessity of continuous renegotiation of the licensing agreement.

III. The Royalty Rate Provision

The next clause in the example package license for discussion, and by far the most important, is the royalty rate provision.

> Unless reduced by written notice of waiver from X Company, the royalties payable hereinunder shall be as follows:
>
> (a) *Group Rate Basis*—A royalty of one and one-half percent (1½%) of the royalty base, as determined in accordance with the provisions of Paragraphs 3(d) and 3(e), for product X or product XA manufactured and sold hereunder in which one or more of the Licensed Patents or Additional Licensed Patents are used by ABC. Licensed Patents or Additional Patents shall not be deemed to be used under this agreement with respect to any of product X or product XA except as such product X or product XA or the process of manufacturing them, are claimed in one or more claims in a Licensed Patent or Additional Licensed Patent that has not expired or has not been surrendered by ABC at the time of the manufacture or sale of product X or product XA. Except in Paragraph 5(a), non-use of any or all of the Licensed Patents or Additional Licensed Patents by ABC shall not affect any of the rights granted to ABC under this agreement.[22]
>
> (b) *Individual Rates Basis*-Option—X Company shall furnish in writing to ABC a list of the individual royalty rates for the use of each of the Licensed Patents and Additional Licensed Patents within ninety (90) days of receipt of written request to do so from ABC. The individual royalty rates furnished by X Company to ABC under this paragraph must be in such amounts as *to provide ABC a reasonable economic alternative to payment of royalties* hereunder on the above Group Rate Basis. ABC may make such a request at any time and may repeat such a request from time to time, such as when any Additional Licensed Patents are acquired by X Company. ABC shall

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[21] Wood, *An Appraisal of Recent Cases Respecting Patents and Antitrust Laws*, 21 Bus. Law 999, 1002 (1966).

[22] Ellis, *Patent Licensing*, § 146 (rev. ed. 1958) says that a nonexclusive license is merely an agreement by the licensor not to sue the licensee for infringement; there is, in the absence of an implied or express agreement to the contrary, no obligation on the part of the licensee to use in the invention; however, Judge Smith in his treatise, Patent Law (rev. ed. 1964), includes a "use" clause in his "Checklist for Use in Drafting or Examining a Patent License Contract" at 1193-1197. Due to the split of authority a nonuse provision has been added.

have the option (i) to elect to pay royalties hereunder selectively on a when, and if used, basis for either a single Licensed Patent or a single Additional Licensed Patent, or any combination of Licensed Patents and Additional Licensed Patents in accordance with the individual royalty rates furnished by X Company, or (ii) to pay, or to continue to pay, royalties hereunder on the Group Rate Basis provided above. ABC's election to accept the Individual Rates Basis for royalty payment shall become effective on the first day of the calendar month immediately following X Company's receipt of ABC's notice of its election. The royalties specified on an Individual Rates Basis shall be payable only with respect to Licensed Patents and Additional Licensed Patents actually used and when used by ABC.

Failure of X Company to comply fully within the prescribed period with any such request by ABC for a list of the individual royalty rates shall constitute a forfeiture by X Company of all royalties that would have been due hereunder on any basis for the time the failure persists.

Whenever the Individual Rates Basis for payment of royalties hereunder is in effect, X Company shall, within ninety (90) days after receipt of request by ABC, offer a license to ABC, and specify in writing the individual royalty rate payable, for ABC's use of any Future Patent identified in the request. Failure by X Company to specify an individual royalty rate for use of any Future Patent within the time prescribed shall be deemed to be a waiver of all royalty payments for the use of such Future Patent for the time the failure persists. In no event shall ABC be required to pay a higher royalty on an Individual Rates Basis for any licensed Patent, Additional Licensed Patents, or Future Patent, than the royalty paid by, or offered to, any other licensee on the same basis.

(c) *Individual Rates Basis to Group Rate Basis and Vice-Versa-Option.* ABC shall also have the option of changing back from any Individual Rates Basis or may have elected to the Group Rate Basis (royalty of 1½% for the group of all Licensed Patents and Additional Licensed Patents, including Future Patents), and thereafter from a Group Rate Basis to an Individual Rates Basis from time to time, by giving X Company notice of its election to change to the new royalty payment basis. Except as changes in the bases of paying royalties hereunder are made pursuant to Paragraph 8, in each case of a change back to a former royalty payment basis, the date for making royalty payments on such basis shall not become effective until one (1) year following receipt by X Company of ABC's election to make such a change.

(d) *Royalty Base for Product X and Product XA.* The royalty base for the computation of the amount specified in sub-paragraph (a) above shall be the net selling price received by ABC on all product X or product XA manufactured hereunder and shipped using one or more of the Licensed Patents

> or Additional Licensed Patents. It is understood that the net selling price, subject to the royalty hereunder, is to be the price F.O.B. plant from which the products are shipped, and if the actual price invoiced to ABC's customer should include freight charges, such charges, together with any trade discounts, excise taxes, or rebates, shall be deductible therefrom to determine the net selling price.

The thoughtful practitioner must consider more than economic factors when preparing the royalty provisions of a defined field license.[23] Keeping in mind the conditions of the royalty rate provision, attention should turn again to the landmark case of *Automatic Radio Mfg., Inc.* v. *Hazeltine,*[24] where the Supreme Court, speaking through Mr. Justice Minton, held that absent a requirement to accept a license on all patents or none, and absent the condition that another and different license must also be accepted, it was proper to license a package of patents expiring at different dates for a flat royalty, measured by a percentage of the licensee's sales of all equipment in the license.[25] The issues before the Supreme Court did not include a refusal to license less than the whole package. However, a District Court in Illinois in *Eversharp, Inc. v. Fisher Pen,*[26] specifically limited misuse to licenses where coercion was present saying,

> The licensing of several patents in a single license agreement does not constitute a patent misuse unless the element of coercion is present, such as where there has been a request by a prospective licensee for a license under less than all of the patents and a refusal by the licensor to grant such a license.[27]

There appears to be an inconsistency between the Hazeltine doctrine and the Third Circuit in *American Securit Co.* v. *Shatterproof Glass Corp.*[28] In comparing the contrary views of the Third Circuit, keep in mind how the example royalty rate provision in sub-clauses (b) and (c) circumvent any possible chance of coming under the *Securit* case. *Securit* demanded a license for *all* of its patents as a package for

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[23] Harmon, *Antitrust and Misuse Implications of the Defined Field License,* 45 J. PAT. OFF. SOC'Y 463, 480 (1963).

[24] 339 U.S. 827 (1950).

[25] *Id.* The court held "in licensing the use of patents to one engaged in a related enterprise, it is not *per se* a misuse of patents to measure the consideration by a percentage of the licensee's sales." *Id.* at 834. Also see generally, Ansell, *Flat-Rate Package Licenses and the Post-Expiration Royalty-Worlds in Collision,* 26 FED. B. J. 206 (1966).

[26] 204 F. Supp. 649 (N.D. Ill. 1961).

[27] *Id.* at 675.

[28] 268 F.2d. 769 (3d Cir. 1959), *cert. denied,* 361 U.S. 902 (1959), where the flat-royalty rate package license practice was held illegal *per se.*

a flat-royalty rate of two cents per sq. foot of *all* glass produced by Shatterproof, who only wanted to obtain a license on an individual patent (economic coercion). The Third Circuit said "[W]hatever may be the asserted reason or justification of the patent owner if he compels a licensee to accept a package or none at all, he employs one patent as a lever to compel the acceptance of a license of another. Equity will not countenance such a result."[29] The Attorney General's Report[30] in approving of the *Hazeltine* case laid the groundwork for the 1959 *Securit* decision saying, "Package licensing should be prohibited only where there is a refusal, after a request, to license less than a complete package.[31]

In accord with the *Securit* doctrine is the Maryland District Court case of *Technograph Printed Circuits, Ltd.* v. *Bendix Corp.*, 218 F. Supp. 1, (1963), where the defendant vigorously attacked the license's provision charging the same royalty rate regardless of the number of patents licensed. Although *Technograph* was not a refusal to license a single patent, nevertheless the licensing practice fell under the condemnation of the Securit doctrine. The Sixth Circuit in *Rocform Corp.*, v. *Acitelli-Standard Concrete Wall*, 367 F. 2d 678 (6th Cir. 1966), recently relied on the Third Circuit *Securit* decision when it affirmed a lower court decision to dismiss an infringement action wherein the defense of misuse was contended because in the licensing arrangement the one important patent (about to expire) was grouped with others of longer duration for 'leverage'). It should be noted that these three decisions condemn flat rate royalty licensing only where coercion is present.

Notice how when the Group Rate Basis of 1½ percent royalty is used (provision 3 [a]), the rate stays the same regardless of the number of patents used (often is the case when it is impossible to use all or even nearly all of the patents in a package license when making a single product) and how under the Individual Rates Basis-Option (provision 3 [b]) the license must provide individual rates for each patent used granting "reasonable economic alternative to payment of royalties under

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[29] *Id.* at 777. Two writers feel that *Securit* requires that the royalty rate be reduced as patents in the package expire. Harris and Siegal, *Evolving Court Opinion on Patent Licensing: An Interaction of Positive Competition and the Law*, 5 IDEA 103, 108 (1961); however, another writer maintains that voluntary package licensing, i.e., a royalty reduction as patents expire, is not within the scope of *Securit*. McCarthy, *A Patent Licensing Policy for Minimizing Antitrust and Misuse Risks*, 46 J.P.O.S. 547 (1964). Also of note in the area of tie-in or package agreements is United States v. Loew's, Inc., 371 U.S. 38 (1962).

[30] REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAW, U. S. Government Printing Office (1955) at 239.

[31] *Id.*

the Group Rate Basis." Both of these provisions are in line with principles postulated in the Attorney General's Report.[32] The licensor should not be required to justify on any proportional basis the royalty rate for less than the complete package, *so long as* the rate set is not so disproportionate as to amount to a refusal to license less than the complete package.[33] For example, where a substantial group of patents is offered at a flat royalty rate, the deletion of one or several specified patents need not affect the royalty rate.[34]

The broad *Securit*,[35] *Technograph*, and *Rocform* decisions leave too many questions unanswered to be accorded equal weight with *Hazeltine*.[36] For example, is there a misuse where one continues to collect royalties for all patents in the package without any reduction for those that expire? What are the criteria for determining the presence of coercion?

From these two lines of decisions the reader may have noticed how clear *Hazeltine* appears to have made the law where a great number of patents in a complex field makes it difficult to determine which of the licensed patents the manufactured product comes under, if any at all; whereas *Securit* indicates where relatively few patents are used and utilization easily resolved, it would be unreasonable to require payment of royalties on the group. The gray area between *Hazeltine* and *Securit* remains unresolved today.

Further it is clear that the licensor should keep all license schemes strictly voluntary and never allow any taint of coercion to take the total package to enter into any license negotiations. However, the licensor should feel free to charge a flat-royalty rate until the last patent in the package expires so long as he feels that such an agreement is bona fide.

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[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] Also *see*, Warner-Lambert Pharm. Co. v. John J. Reynolds, Inc. 178 F. Supp. 655 (S.D.N.Y. 1959), *aff'd* 280 F.2d 197 (2d Cir. 1960); Scapa Dryers, Inc. v. Abney Mills, 269 F.2d 6 (5th Cir. 1959), *cert. denied* 361 U.S. 901 (1959). Both cases say the *Securit* doctrine should be followed because public policy may require expiration of the package license with termination of each patent contained therein.

[36] The *Hazeltine* doctrine gained support in the Seventh Circuit in Apex Electrical Mfg. Co. v. Altorfer Bros. Co., 238 F.2d 867 (7th Cir. 1956), where it held that, in a case in which there was no refusal to license (voluntary licensing) less than all of the three patents in the package, it was no misuse for the patent owner to insist that exactly the same royalty per item be paid whether the license was under one, two or three of the patents. See also, Carter Prods. Inc. v. Colgate-Palmolive Co., 164 F. Supp. 503 (D.Md. 1958), *aff'd* 269 F.2d 299 (4th Cir. 1959).

Turning now to the economics surrounding the royalty rate provision, when setting the group royalty rate, the various ways of measuring the rate must be given economic weight. The economic objectives may be achieved by a rule forbidding royalty structure which impose on different segments of an industry charges that are disproportionate to the sales or to the variable costs of the respective segment. Since sales figures (net selling price) are more easily determinable and less likely to be regarded as confidential by the licensee than are variable cost figures, a royalty precentage based on dollar sales would be the more desirable approach.[37] However, royalty structures based on net selling price generally will have a more restrictive impact on licensee output than royalty structure based on an input selected to measure use of the invention. The same theory applies equally to a royalty structure based on variable cost of all inputs.[38]

There are two rules limiting licensor freedom to shape his royalty structure. When granting a package license to groups of licensees who are in competition, each having significantly differing technology from the other such that their demand elasticities for the invention differ, the patentee should base the royalty percentage on unpatented end-product sales of the licensees. Under other circumstances the patentee must base royalty on the licensee's consumption of a particular input or group of inputs closely associated with the practice of the invention. Any attempt to forbid a royalty rate based on licensee's elasticity of demand where there is no substantial marginal cost will involve other costs in excess of any profit licensee may derive.[39] End-product royalties should be forbidden on unpatented articles as coming under Section 1 of the Sherman Act, except in the case of process inventions.

Proportionality of royalty charges to some particular input is no guarantee against licensor adsorption of a potential cost advantage of one group of licensees, but selection of an input which will measure elasticity of demand and thus maximize royalty and nullify a potentially significant cost advantage of one group requires considerable discretion. Therefore, from both a judicial and economic standpoint the best royalty rate provision is a flat royalty rate over the term of the license for a percentage of the net selling price (output).

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[37] The royalty in *Hazeltine* was 1.05% on gross sale of enumerated equipment to which its use of the patent was confined and a yearly royalty minimum. In the example royalty rate provision the Group Rate was 1½% of the royalty base, and the royalty base for the Group Rate was the net selling price received.

[38] Baxter, *Legal Restrictions on Exploitation of the Patent Monopoly: An Economic Analysis*, 76 YALE L. REV. 267, 295 (1966).

[39] *Id.* at 295, 308.

IV. Term And Termination

This agreement shall extend to the end of the term of the last to expire of the Licensed Patents and Additional Licensed Patents and no longer (not including any of such patents with respect to which ABC surrendered its license hereunder), unless the agreement is sooner terminated as follows:

(a) In the event ABC fails to (i) manufacture or sell any of product X or product XA using any one or more of the Licensed Patents or Additional Licensed Patents during any full calendar year after the date of this agreement, or (ii) apply the patent notices as prescribed, or (iii) keep records, or (iv) render reports, or (v) make payments of royalties as required under this agreement, and such failures or breach shall continue for a period of sixty (60) days after written notice specifying the details thereof has been given by X Company, thereafter at any time within thirty (30) days after such sixty (60) day period, X Company may cancel the agreement by giving thirty (30) days written notice of cancellation; or

(b) ABC may cancel this agreement at any time and for any reason by giving two (2) years written notice of cancellation. ABC shall also have the right (i) to surrender its license under any one or more of the Licensed Patents or Additional Patents at any time and for any reason by giving two (2) years written notice, or (ii) to surrender its license under any Licensed Patent or Additional Patent by giving thirty (30) days written notice at any time after such Licensed Patent or Additional Licensed Patent, or any particular claim therein, is declared invalid or unenforceable by decree of a competent court of final jurisdiction or of a lower court whose decree becomes final by reason of failure to appeal therefrom, but such surrender shall not affect the license granted under each of the other Licensed Patents or Additional Licensed Patents.

A quick reading of the example term provision would make the provision appear to be squarely in conflict with decisions pertaining to post-expiration royalties. However, the licensee's ability to change from the Group Rate Basis to the Individual Rate Basis at any time under provision 3 (b), enables both the licensor and licensee to enjoy the economic advantages of a package license while side stepping the several adverse post expiration royalty decisions. The landmark decision in the area of post expiration royalties is the Supreme Court decision of *Brulotte* v. *Thys Co.*[40] wherein the court concluded that the use by a patentee of a patent beyond the expiration date of the patent is unlawful *per se*.[41] The facts in the case are interesting because they

[40] 379 U.S. 29 (1964).

[41] *Id.* at 32. For a criticism of the *Brulotte per se* rule see Comment, *Validity of Patent License Provisions Requiring Payment of Post-Expiration Royalties*, 65 Col. L. Rev. 1256, 1264 (1965).

are easily related to the termination provision of the example package license. The Thys Co. package license consisted of twelve patents, only seven of which were incorporated into the licensed machines. All seven of the pertinent patents expired *before* the termination of the package license, and therefore the license was illegal.

The package license of the example contemplates the use of at least one necessary patent remaining in effect until the termination date.[42] The *Brulotte* case therefore stands for the proposition that, "The exaction of royalties for use of a machine after the patent has expired is an assertion of monoply power in the post-expiration period when . . . the patent has entered the public domain."[43]

The Supreme Court related post-expiration royalty provisions in a package license to the proposition set forth in *Scott Papers Co. v. Marcalus Co.*, 326 U.S. 249 (1945), that one, by a patent license, or otherwise, cannot withhold from public use an invention for which a patent has expired. *Technograph Printed Circuits, Ltd. v. Bendix Corp.*,[44] a predecessor to *Brulotte*, also relying on the *Scott* case, firmly stated that, "Express requirement that royalty be paid on a patent for five years after its expiration seems to be a clear violation of established principles that a monopoly of a patent cannot be continued, even by agreement, beyond its expiration date."[45] However, the recently decided case of *Rocform Corp. v. Acitelli-Standard Concrete Wall*,[46] was in accord with *Brulotte* saying,

> We believe such a contract when it contains no diminution of license fee at the expiration of the most important patent and contains no termination clause at the will of the licensee, constitutes, in effect, an effort to continue to collect royalties on an expired patent.[47]

Situations in which royalties are extended *after* the last patent has expired should be condemned as in *Brulotte*, but the rule should not be extended further as seems to be the implication of *Brulotte* itself.[48]

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[42] The court did stipulate that Automatic Radio v. Hazeltine was not apropos where a machine was the subject matter licensed.

[43] 379 U.S. 29, 33 (1964).

[44] 218 F. Supp. 1 (D. Md. 1963).

[45] *Id.* at 48. Surprisingly, *Technograph* was not even cited by the court in the Brulotte case.

[46] 367 F.2d 678 (6th Cir. 1966).

[47] *Id.* at 681. A vigorous dissent by Judge O'Sullivan stated that fixing one price for use of the Rocform System and any one or all of Rocform's patents does not constitute illegal extention where no coercion was employed. *Id.* at 684.

[48] Brulotte v. Thys Co., 379 U.S. 29 (1964).

What economic criteria should be used in determining the royalty rate provision coupled with the correct termination provision in the package license. Package licensing of a patent to which a common input royalty base is appropriate should not be prohibited provided that the license gives the licensee an option to terminate the license on the date of expiration of any one patent included in the package. However, the use of the net selling price as a royalty basis is more widely used even though it is more restrictive. The following hypothetical shows the effect of not extending the computation period. Assume the computation for five years at four cents with a ten year payout would produce receipts of the same value as two cents over ten years. Although the private economic interest of the parties may be identically affected by the two arrangements, the output and prices will not be; and it is the latter to which the law should direct its attention. Royalties affect marginal costs, and hence output prices, of licensees only during computation period; therefore it is a fixed cost. Output will be more severely restricted and prices higher during the first five years and vice versa. The basic question is whether there is an economic basis which justifies depriving the patentee and licensee of freedom to bargain for a license under which royalty computation as opposed to royalty payout, extends beyond the life of the patent. Since royalty computation after the patent expiration will restrict output after expiration, it is enough to say that such a license does extend the monopolistic impact of the patent beyond its statutory term and is illegal.[49]

A package license should be held terminable at the licensee's option upon expiration of *any* patent covered by the license; otherwise it would be coercive to require the licensee to remain at the original royalty rate level, *i.e.*, Group Rate Basis.[50] If the licensee does not choose to terminate upon expiration of a given patent, that fact affords adequate assurance that the royalty rate is comparable to the value of the patent licensed.[51]

V. Conclusions

"The obvious social utility in encouraging transfers of large blocs of technology has been stated, and the flat rate package license makes it

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[49] Baxter, *Legal Restrictions on Exploitation of the Patent Monopoly: An Economic Analysis*, 76 Yale L. Rev. 267, 328 (1966).

[50] Notice how this option is easily effected in the example package license by provision 3 (c).

[51] One writer feels that parties to a package license should be able to agree to compute the value of a patent over its life with payments spread over a longer period as long as licensee has power to terminate. Baxter, *Legal Restrictions on Exploitation of the Patent Monopoly: An Economic Analysis*, 76 Yale L. Rev. 267, 328 (1966).

practical by elimination of complex validity, infringement, accounting, and related problems."[52]

Although several of the decisions in the area of package licensing appear to condemn the practice *per se*, a skilled practitioner may efficiently side-step the adverse decisions without losing any of the economic benefits inherent in a package license. The example license set out in Appendix A should give the practitioner a guide in writing a "protected" package license.

The Supreme Court approved package licensing in *Hazeltine* in 1950, and it would not appear to have changed its mind because certiorari was recently denied in the package license case of *McCullough Tool Co. v. Wells Surveys, Inc.*[53] Surprisingly, neither the President's Commission,[54] nor the Patent Reform Act,[55] nor the American Bar Association[56] have had any recommendations concerning the area of package licensing. Because of a noncommittal attitude, it appears that they are in apparent agreement with current court decisions.

To limit a package license to expiration of the first patent in the package, as implied by the *Brulotte* line of cases would seem rather impractical and necessitate frequent relicensing of the package. The *Brulotte* line of cases should be strictly limited to cases wherein royalties are expected after expiration of the last patent in the package. The only time package licensing should be condemned is where any amount of coercion is present; therefore, any compulsion to take unwanted patents is illegal *per se*, except in the case of blocking patents. There must be an economic alternative for the licensee in accepting the package license. Therefore, package patent licensing cannot be a *per se* violation of the antitrust laws.[57] Consequently, the bold approach taken in *Hazeltine* should be followed. Such approach may best be stated,

> The corporate-licensor should feel free to charge the flat package rate until the last patent in the package has expired so long as it feels that such an agreement is a bona fide convenient method of operation used to avoid troublesome questions of infringement, complex bookkeeping, cost differences and similar practical considerations.[58]

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[52] Harmor, *Antitrust and Misuse Implications of the Defined Field License*, 45 J. Pat. Off. Soc'y 463, 480 (1963).

[53] 343 F.2d 381 (10th Cir. 1965), *cert. denied* 383 U.S. 933 (1966).

[54] TO PROMOTE THE PROGRESS OF . . . USEFUL ARTS—IN AN AGE OF EXPLODING TECHNOLOGY, Report of the President's Commission on the Patent System, 1966.

[55] PATENT REFORM ACT OF 1967, H. Doc. No. 59, 90th Cong., 1st Sess. (1967).

[56] American Bar Association, Section of Patent, Trademark and Copyright Law, Report of Committee 101, 1967.

[57] Burns, *Does Package Licensing Violate the Antitrust Laws*, 41 J. PAT OFF. SOC'Y 259 (1959).

[58] McCarthy, *A Patent Licensing Policy for Minimizing Antitrust and Misuse Risks*, 46 J. Pat. Off. Soc'y 560 (1964).

Simply stated, a package license is a license of convenience and is not contra to public policy.

Appendix A

This is a complete package licensing agreement written to encompass and comply with the judicial and economic rules set forth and explained in the body of this paper. This licensing agreement is meant to serve by way of example only and is not intended for actual use as it was written with a specific situation in mind.

License Agreement

THIS AGREEMENT, made as of the ____ day of _____ 19 ____, by and between EXCITABLE COMPANY, a Delaware company having its principal office at 123 Lips Avenue, Somewhere, New York, hereinafter referred to as "X Company", and Alpha, Beta Cooper Corporation, a Delaware corporation having its principal business office at The Loop, Elsewhere, New York, hereinafter referred to as "ABC".

X Company and ABC agree as follows:

Licensed Patents

The United States Letters Patent under which this license is granted (Licensed Patents) are:

Licensed Patents

Patent No.	*Inventor(s)*	*Title*	*Expiration Date*
1. 1,234,567	Jones	Process X	12-25-75
2. 1,234,568	Jones, Smith	Product X	12-25-75
3. 3,116,335	Smith	Product XA	1-13-85

1. The License

X Company grants to ABC, subject to the conditions and agreements hereinafter recited, a non-exclusive license, under the claims of each of the Licensed Patents, to manufacture in the United States only, and use and sell, product X and product XA in which, or in the manufacture of which, any one or more of such Licensed Patents are used. The license under each of the Licensed Patents shall be deemed to be separate and distinct from the license under any other Licensed Patents and, as hereinafter provided, ABC shall have the right to surrender and terminate its license under any one or more of the Licensed Patents without affecting its license under any other Licensed Patent.

Any and all other United States patents relating to product X or product XA acquired after the date of this agreement or issuing after the date of this agreement, and owned by X company, or under which X company acquires the right to sublicense after the date of this agree-

ment (all of such patents being hereinafter referred to as "Future Patents") shall be automatically included in this agreement without additional royalty payment when the Group Rate Basis for payment of royalties is in effect. All of such automatically licensed Future Patents and any other Future Patents under which a license is acquired by ABC when the Individual Rates Basis for payment of royalties is in effect are hereinafter referred to as "Additional Licensed Patents." ABC shall have the right to surrender and terminate its license under any one or more of the Additional Licensed patents without affecting its license under any other Licensed Patent or other Additional Licensed Patent.

2. PATENT NOTICE

It is understood, and ABC agrees, that each product manufactured under this agreement shall have imprinted thereon an appropriate notice of the patents licensed hereunder in the form and location on the product as prescribed by X Company as per Exhibit "A". Patent notice changes may be made at the time existing printing plates are replaced in the normal course of business.

3. ROYALTY

Unless reduced by written notice of waiver from X Company, the royalties payable hereinunder shall be as follows:

(a) *Group Rate Basis*—A royalty of one and one-half percent (1 ½%) of the royalty base, as determined in accordance with the provisions of Paragraphs (d) and (e), for product X or product XA manufactured and sold hereunder in which one or more of the licensed patents or Additional Licensed Patents are used by ABC. Licensed Patents or Additional Patents shall not be deemed to be used under this agreement with respect to any of product X or product XA except as such product X or product XA or the process of manufacturing them, are claimed in one or more claims in a Licensed Patent or Additional Licensed Patent that has not expired or has not been surrendered by ABC at the time of the manufacture or sale of product X or product XA. Except as provided in Paragraph 5 (a), non-use of any or all the Licensed Patents or Additional Licensed Patents by ABC shall not affect any of the rights granted to ABC under this agreement.

(b) *Individual Rates Basis-Option*—X Company shall furnish in writing to ABC a list of the individual royalty rates for the use of each of the Licensed Patents and Additional Licensed Patents within ninety (90) days of receipt of written request to do so from ABC. The individual royalty rates furnished by X Company to ABC under this paragraph must be in such amounts as *to provide ABC a reasonable economic alternative to payment of royalties* hereunder on the above Group Rate Basis. ABC may make such a request at any time and may repeat such a request from time to time, such as when any Additional Licensed Patents are acquired by X Company. ABC shall have the option (i) to elect to pay royalties hereunder selectively on a when, and if used, basis for either a single Licensed Patent or a single Additional Licensed Patent, or any combination of Licensed Patents and Additional Licensed

Patents in accordance with the individual royalty rates furnished by X Company, or (ii) to pay, or to continue to pay, royalties hereunder on the Group Rate Basis provided above. ABC's election to accept the Individual Rates Basis for royalty payment shall become effective on the first day of the calendar month immediately following X Company's receipt of ABC's notice of its election. The royalties specified on an Individual Rates Basis shall be payable only with respect to Licensed Patents and Additional Licensed Patents actually used and when used by ABC.

Failure of X Company to comply fully within the prescribed period with any such request by ABC for a list of the individual royalty rates shall constitute a forfeiture by X Company of all royalties that would have been due hereunder on any basis for the time the failure persists.

Whenever the Individual Rates Basis for payment of royalties hereunder is in effect, X Company shall, within ninety (90) days after receipt of request by ABC, offer a license to ABC, and specify in writing the individual royalty rate payable, for ABC's use of any Future Patent identified in the request. Failure by X Company to specify an individual royalty rate for use of any Future Patent within the time prescribed shall be deemed to be a waiver of all royalty payments for the use of such Future Patent for the time the failure persists. In no event shall ABC be required to pay a higher royalty on an Individual Rates Basis for any licensed Patent, Additional Licensed Patents, or Future Patent, than the royalty paid by, or offered to, any other licensee on the same basis.

(c) *Individual Rates Basis to Group Rate Basis and Vice-Versa-Option.* ABC shall also have the option of changing back from any individual Rates Basis or may have elected to the Group Rate Basis (royalty of 1½% for the group of all Licensed Patents and Additional Licensed Patents, including Future Patents), and thereafter from a Group Rate Basis to an Individual Rates Basis from time to time, by giving X Company notice of its election to change to the new royalty payment basis. Except as changes in the bases of paying royalties hereunder are made pursuant to Paragraph 8, in each case of a change back to a former royalty payment basis, the date for making royalty payments on such basis shall not become effective until one (1) year following receipt by X Company of ABC's election to make such a change.

(d) *Royalty Base for Product X and Product XA.* The royalty base for the computation of the amount specified in sub-paragraph (a) above shall be the net selling price received by ABC on all or either product X or product XA manufactured hereunder and shipped using one or more of the Licensed Patents or Additional Licensed Patents. It is understood that the net selling price, subject to the royalty hereunder, is to be the price F.O.B. plant from which the products are shipped, and if the actual price invoiced to ABC's customer should include freight charges, such charges, together with any trade discounts, excise taxes, or rebates, shall be deductible therefrom to determine the net selling price.

(e) *Time of Royalty Payments.* The royalty payments shall be made contemporaneously with the reports required under Paragraph 4 hereof.

4. Records and Reports

ABC agrees to keep full and accurate records of all products manufactured and shipped hereunder including the net selling price thereof, and to make written reports thereof to X Company before the twentieth (20th) day of each month covering shipments of the preceding month. In each such report ABC shall give the essential particulars relating to said shipments, including the name and address of each customer to whom each shipment is made, the date of each shipment, the quantities of product X and product XA of each size and category in each shipment, the net selling price thereof, and, when ABC had elected the Individual Rates Basis for payment of royalties hereunder, the Licensed Patents and Additional Licensed Patents used for each kind and quantity of product X and XA shipped. Concurrently with the filing of such reports, ABC shall pay to X Company the royalty payment due with respect to the patents used in accordance with Paragraph 3.

5. Term and Termination

This agreement shall extend to the end of the term of the last to expire of the Licensed Patents and Additional Licensed Patents and no longer (not including any of such patents with respect to which ABC surrendered its license hereunder), unless the agreement is sooner terminated as follows:

(a) In the event ABC fails to (i) manufacture or sell any of product X or product XA using any one or more of the Licensed Patents or Additional Licensed Patents during any full calendar year after the date of this agreement, or (ii) apply the patent notices as prescribed, or (iii) keep records, or (iv) render reports, or (v) make payments of royalties as required under this agreement, and such failures or breach shall continue for a period of sixty (60) days after written notice specifying the details thereof has been given by X Company, thereafter at any time within thirty (30) days after such sixty (60) day period, X Company may cancel the agreement by giving thirty (30) days written notice of cancellation; or

(b) ABC may cancel this agreement at any time and for any reason by giving two (2) years written notice of cancelation. ABC shall also have the right (i) to surrender its license under any one or more of the Licensed Patents at any time and for any reason by giving two (2) years written notice, or (ii) to surrender its license under any Licensed Patent or Additional Patent by giving thirty (30) days written notice at any time after such Licensed Patent or Additional Licensed Patent, or any particular claim therein, is declared invalid or unenforceable by decree of a competent court of final jurisdiction or of a lower court whose decree becomes final by reason of failure to appeal therefrom, but such surrender shall not affect the license granted under each of the other Licensed Patents or Additional Licensed Patents.

6. Conditions on Cancellation

In the event the agreement is cancelled by X Company on thirty (30) days notice, as provided for in Paragraph 5 (a), the following shall apply:

(a) The license granted ABC hereunder to manufacture and sell said Products shall terminate immediately.

(b) Notwithstanding the provisions of sub-paragraph (a) above, ABC may complete or fill any bona fide written orders on hand, and sell any product X or product XA on hand, when notice of cancellation from X Company is delivered to ABC, provided, however, the delivery of all products both X and XA to complete all orders and all sales shall be effected within six (6) months after such cancellation.

(c) If ABC, prior to receiving such notice of cancellation has purchased and/or has definitely committed itself to purchase raw material in an amount or amounts which is more than necessary to fill such orders according to (b), then X Company, at its election, either shall extend ABC's license hereunder for a sufficient length of time to enable ABC to dispose of the excess raw material, or shall, upon demand by ABC, purchase such excess raw material from ABC at the then prevailing market price for like material.

7. Infringements

X Company shall at its own expense defend ABC in any suit brought against ABC based on the charge that the manufacture or sale by ABC of product X or product XA hereunder constitutes an infringement of any Letters Patent, including any patent issuing on S.N. ____ filed_____, 19__, and X Company shall pay any award of damages and/or profits made in any such suit by a court of last resort or by any lower court, if X Company shall not have duly appealed from and secured a reversal of the decision of such lower court; provided that ABC notify X Company promptly of such suit and assist X Company (excluding financial assistance) in defending such suit, and deliver to X Company, without cost to X Company, any information in ABC's possession pertinent to the issue involved. ABC shall, however, have the right to be represented in such suit by counsel of its own selection, acting at its own expense.

8. Equalization of Royalties or Other Terms

X Company agrees that in the event it shall have entered or shall hereafter enter into any license agreement, or shall modify any existing license agreement with respect to the United States under the aforesaid Licensed Patents or the Additional Licensed Patents (a) at a lower or more advantageous group royalty rate than the Group Rate Basis herein specified, (b) at any individual royalty rates for the use of any of the Licensed Patents or Additional Licensed Patents which have not been furnished to ABC by X Company, (c) at any individual royalty rates for the use of any of the Licensed Patents, Additional Licensed Patents or any Future Patents which are lower or more advantageous than any of the individual rates furnished to ABC by X Company for the use of such patent, or (d) on terms (other than royalty terms) different from those applicable to ABC hereunder, then and thereafter, ABC shall have the right at any time to have any of such other royalty rate or rates and such different terms substituted in the ABC agreement. X Company will, within sixty (60) days, give to ABC a copy of such other license incorporating such other royalty rate or rates and/or such different terms under similar conditions.

COMMERCIAL PRODUCTION

Nothing contained in this agreement shall be construed as restricting the right of ABC to make, use or sell any particular product or products not herein licensed.

ABC agrees that in the event it is not in commercial production of any product X or product XA, using any of the Licensed Patents or Additional Licensed Patents, on or before _____, 19__, X Company may, at its option, terminate and cancel this agreement pursuant to Paragraph 5 (a).

10. SEPARABILITY

If any term, clause or provision of this agreement shall be judged to be invalid for any reason whatsoever, such invalidity shall not affect the validity or operation of any other term, clause or provision, and such invalid term, clause or provision shall be deemed to have been deleted from this agreement.

11. ARTICLE TITLES

The headings of the articles of this agreement have been inserted only to facilitate reference and shall not be taken as being of any significance whatsoever in the construction and interpretation of this agreement.

12. NOTICE

Any notices to be given hereunder shall be in writing and by registered mail, and addressed to Alpha, Beta Cooper Corporation, The Loop, Elsewhere, New York, and to Excitable Company at 123 Lips Avenue, Somewhere, New York or to such other address as either party hereto may hereafter in writing supply the other.

13. SUCCESSION

This agreement shall be binding upon and inure to the benefit of the successors in business or assigns of X Company, and the successors in business of ABC. It is understood that the successors in business of ABC shall refer to a successor of that portion of ABC's business relating to the conversion of product BP into product X or product XA of the general type manufactured under this agreement, or to any subsidiary of ABC operating any portion of its business.

IN WITNESS WHEREOF, the parties have caused this agreement to be executed by their duly authorized representatives.

EXCITABLE CORPORATION
By _____
Date _____

In the presence of:

_____

By _____
Date _____
ALPHA, BETA COOPER CORPORATION

In the presence of:

_____

THE SOCIAL SECURITY ADMINISTRATION VERSUS THE LAWYERS . . . AND POOR PEOPLE TOO

*Robert M. Viles**

PART I

If I bend my back it gives me such miseries I can't stand it," he said. He went to work in the mines when he was fourteen, and stayed there until about a year ago.

His present age is a matter of dispute between him and the the federal government. Ed [Sizemore] is trying to get social security.

. . . .

He massaged the small of his back through his loosely fitting overalls, and tried to tell of his difficulties with federal authority. "I don't get a dime from the government," he said. Hurt filled his pale blue eyes. He shuffled his blocky figure beneath the folds of the overalls. "Oh, I got a little compensation when I got hurt. I'm going in front of the doctors agin 'fore long. One's a social-security doctor, too. I got plenty in that social security. Buddy, I worked years and years before social security ever thought of coming in. I was working when the man brought that card up to me for me to sign.

I said, 'What is it?' It was all green to me.

. . . .

"Hit'll be a year the sixteenth of this month since I was hurt. I'm old enough to retire, as far as that goes. They sent and got fifty-four as my age. Well, I was sixty-two years old two years ago, but they wouldn't have it that way. I just let it go for then. I seen I couldn't do no better.

"The government ought to see to a man when he's down and out. But they are hardest on the man who put it in, in the world. He can put it in, but he can't get it out. And nobody in this whole county helped me."[1]

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* Assistant Professor of Law and Assistant Dean, University of Kentucky College of Law. The author expresses his appreciation for the invaluable information and advice liberally furnished him during the course of preparing this article by many individuals associated with social security proceedings. He of course assumes sole and complete responsibility for all opinions, biases, recommendations, and factual errors appearing in the article.

[1] J. FETTERMAN, STINKING CREEK, 34, 37 (1967). Copyright, ©, 1967 by John Fetterman, Reprinted by permission of E. P. Dutton & Co., Inc.

> I don't handle very many social security matters because when they come into my office we send them down to the authorities at the municipal court to talk to the social security man because I just cannot afford to handle this type of client.
>
> Columbia, Mo., is a city of some 50,000 people. I don't know a lawyer there—and there are about 40—that handles any of these cases. The people are left to go before the agency and to get the only treatment they can get that is administered by the agency.[2]

I. Social Security as a Welfare Program: Where It Came From and Where It Is Going

The federal system of Old-Age, Survivors, Disability and Health Insurance, established under Titles II and VIII of the Social Security Act of 1935, as amended,[3] and popularly known as "social security,"[4] has lately come under attack for drifting from the course charted for it.[5] It is alleged that the program has evolved from a modest public pension plan self-financed through tax contributions of persons insured under it into an inadequate social welfare scheme supported by regressive taxation. At the same time that the program is praised for its massive contribution to the fight against poverty, it is attacked for placing the burden of aid exclusively upon the middle and lower economic classes. However, as a middle-class institution which pays cash grants to the poor, it has escaped the mounting criticism of ineffectiveness, unfairness, and unconstitutionality lodged against public assistance. This article examines the administration of the social security institution, especially

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[2] Testimony of George A. Spencer, Esquire, at *Hearing on Attorneys' Fees, Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. 53 (1966).

[3] 42 U.S.C. §§ 401-23 (1964), *as amended*, Supp. I, §§ 401-27, 1395-1395 (1965), *as amended*, 81 Stat. 821, §§ 1-173 (13 U.S.C. Cong. & Ad. News 4576-4642, Jan. 20 1968). All references in this article to Social Security Act provisions currently in force are cited to the Act only, as amended through 1965, *e.g.*, Social Security Act §§ 201-27, 1801-75, unless they are affected by the Social Security Amendments of 1967, enacted into law on Jan. 2, 1968, cited to 81 Stat. 821 (13 U.S.C. Cong. & Ad. News, Jan. 20, 1968), as above.

[4] The Social Security Act also provides for state "public assistance" programs, Titles I, IV, X, XIV, XVI, including "medicaid," Title XIX; unemployment compensation programs, Titles III, IX, XII, XIV; and other social assistance.

[5] *See, e.g.*, D. Cordz, *Social Security: Drifting Off Course*, Fortune, Dec. 1967, at 104; Buchanan & Campbell, *Voluntary Social Security*, Wall Street Journal, Dec. 20, 1966, at 14, col. 3.

the processes for adjudicating claims for benefits and assesses their impact on the other Americans that make up the poor.

The Social Security Act of 1935 was promoted by President Franklin Roosevelt as a comprehensive, integrated package of legislative devices for permanently removing through social insurance the basic threats to individual and family security, especially old age and unemployment.[6] The contents of the Act were recommended by the Committee on Economic Security, appointed by the President,[7] which hurriedly[8] proposed a broad range of programs, including direct assistance to the needy aged and to fatherless children, child care services, child and maternal health services, public health services, and unemployment compensation,[9] in addition to both compulsory and voluntary old-age annuities (social insurance).[10] The Act was passed, with many technical and some substantive amendments to the Committee's proposals, by a diffident Congress, faced with the destitution and unrest of the Great

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[6] See PRESIDENT ROOSEVELT, MESSAGES TO CONGRESS, June 8, 1934, in H.R. Doc. No. 397, 73d Cong., 2d Sess. (1934); Jan. 17, 1935, in *Hearings on H.R. 4120 Before the House Comm. on Ways and Means*, 74th Cong., 1st Sess. 13 (1935) [hereinafter cited as 1935 *House Hearings*].

[7] The Committee consisted of the Secretary of Labor, chairman, the Secretary of the Treasury, the Attorney General, the Secretary of Agriculture, and the Federal Emergency Relief Administrator. The President also appointed an Advisory Council on Economic Security, composed of prominent citizens in business, labor, social welfare, and government, and authorized the Committee to appoint an executive director and select a Technical Board. Other specialized advisory committees were later designated. The executive director was Professor Edwin E. Witte, whose account of the Committee's work, written in 1936 but published posthumously, is an invaluable aid in understanding the events surrounding the formation and enactment of the Social Security Act of 1935. E. WITTE, THE DEVELOPMENT OF THE SOCIAL SECURITY ACT (1962). [hereinafter cited as Witte].

[8] The Committee submitted its final report on Jan. 17, 1935, *id.* at 75, although much of the staff work supporting it did not begin until August and September of the previous year. *Id. passim.*

[9] "Unemployment compensation was regarded by the Committee on Economic Security and its staff as the most important part of the entire legislation. In Congress and on the part of the general public, however, there was far less interest in this subject than in old age assistance." *Id.* at 111.

[10] COMMITTEE ON ECONOMIC SECURITY, REPORT, in *1935 House Hearings* 19-62. The Committee studied health insurance extensively but was not prepared to report recommendations for it. *Id.* at 23. The problems of the disabled were not, however, seriously considered. Witte 189.

Depression and with such popular but fantastic schemes for massive direct relief as the legendary Townsend Plan.[11]

In the course of their deliberations both the Ways and Means Committee of the House of Representatives and the Finance Committee of the Senate nearly abandoned the proposal for old-age social insurance, and it did modify substantially the recommendation of the Committee on Economic Security.[12] Their concern was directed to the immediate relief forthcoming from federal contributions to state plans for old-age assistance already in existence and to those to be encouraged by the Act.[13] Social insurance had been presented as a second-stage program which, as contributions into it became adequate to pay retirement benefits, would eventually displace direct assistance to the aged.[14] Moreover, some Committee members seriously doubted whether the

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[11] *See id. passim.* The House Ways and Means Committee gave courteous treatment to Dr. Francis E. Townsend, originator of the Townsend Old-Age Revolving Pension, H.R. 3977, as modified, H.R. 7154, 74th Cong., 1st Sess. (1935), and his associates, but subjected their testimony to sharp and reasoned criticism. *1935 House Hearings* 677-760. The original Townsend Plan awarded pensions of $200 per month to all persons over 60 years of age agreeing not to do gainful work and to spend the stipend within 30 days. The principle behind the Plan was the multiplier effect, *i.e.*, the idea that cash pumped into the economy goes through many transactions, each of which swells the gross national product and contributes toward the economic well-being of the country. Dr. Townsend proposed to finance his scheme by a 2% tax on all business transactions. Notwithstanding its unsuccessful reception in the Committee and its ultimate failure in Congress in competition with the Social Security Act bill, the Plan reappeared in 1939, when the Social Security Act was substantially amended, as the General Welfare Act, H.R. 2, 76th Cong., 1st Sess. (1939), which slightly modified the prior bills. The Ways and Means Committee again extensively considered the proposal (and the Townsend movement itself) and again rejected it. *Hearings Relative to the Social Security Act Amendments of 1939 Before the House Comm. on Ways and Means*, 76th Cong., 1st Sess. *Passim.* (1939).

[12] The social security portion of the bill was nearly lost in both the House and Senate Committees. In an effort to report favorably on the compulsory program the voluntary counterpart was dropped in the House Ways and Means Committee, only to be restored in the Senate Finance Committee, which approved the voluntary program by a bare majority vote. WITTE 93-94, 102-4. In addition, the Ways and Means Committee modified the proposed tax and benefit provisions and excluded agricultural, domestic, charitable, educational, ministerial, and casual employees from coverage. *Id.* at 147-59. The Clark amendment to exclude employers with industrial pension plans from compulsory participation in social security was narrowly defeated in the Conference Committee on the hill after passage in the Senate. The amendment was strongly backed by a private insurance lobby. *Id.* at 105-8, 160-62.

[13] See H.R. REP. NO. 615, 74th Cong., 1st Sess. 4-5 (1935) [hereinafter cited as 1935 HOUSE REPORT].

[14] WITTE 146.

Supreme Court would uphold the constitutionality of federal social insurance legislation.[15] Only the insistence of President Roosevelt that the Committee's recommendations be enacted substantially intact saved social security from excision from the Social Security Act of 1935.[16]

The course which Congress originally charted for social security has been widely misconceived throughout its history. Although the concept

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[15] On May 6, 1935, the Supreme Court of the United States had held that the Railroad Retirement Act of 1934, a compulsory pension system for railway employees, was beyond the authority of the federal government under either the due process or the interstate commerce clauses of the Constitution. Railroad Retirement Bd. v. Alton R.R., 295 U.S. 330. Although the draftsmen worked strenuously to place the benefit undertakings and the tax provisions in entirely separate title of the bill, many Congressmen feared the Social Security Act would fall by the same ax. "The best legal talent that the Attorney General's office and the Brain Trust could marshall has for weeks applied itself to the task of trying to bring these titles within constitutional limitations. Their best effort is only a plain circumvention." Minority Report, 1935 HOUSE REPORT 43. The argument for unconstitutionality tended to merge with preferences for opposing social insurance. *See, e.g.*, the testimony of Senator Hastings, *1935 House Hearings* 959. The forebodings were, however, all for nought. In *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937) and *Helvering v. Davis*, 301 U.S. 619 (1937), the Supreme Court found respectively the unemployment compensation and old-age annuities programs as well as the taxing provisions of the Act to be constitutional. The language of Mr. Justice Cardozo, speaking for the Court, was eloquent. "There have been great statesmen in our history who have stood for other views. We will not resurrect the contest. It is now settled by decision [that Congress may spend money in aid of the 'general welfare']. . . . Yet difficulties are left when the power is conceded. The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event. There is a middle ground or certainly a penumbra in which discretion is at large. The discretion, however, is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment. . . . The problem [of dependency among persons over 65 years] is plainly national in area and dimensions. Moreover, laws of the separate states cannot deal with it effectively. Congress, at least, had a basis for that belief. States and local governments are often lacking in the resources that are necessary to finance an adequate program of security for the aged. . . . Only a power that is national can serve the interests of all. Whether wisdom or unwisdom resides in the scheme of benefits set forth in Title II, it is not for us to say. The answer to such inquiries must come from Congress, not the courts. Our concern here, as often, is with power, not with wisdom." *Id.* at 640, 644.

It is impossible to determine, however, whether or to what extent the changes worked in the provisions for old-age annuities to avoid constitutional illegality may have affected the subsequent course of social security. Certainly by the separation of benefit payments from tax contributions the comparison with private insurance annuities was weakened.

[16] WITTE 95.

was not novel in 1935 in Western countries,[17] the terms "insurance" and "actuarially sound" connected with the United States program have raised many false inferences and much misunderstanding. They suggest that social security is similar to private insurance,[18] which by contractual agreement pays benefits upon the occurrence of contingent, or partially contingent, events. The amount of benefits varies directly with the size of the premiums paid for the insurance and with the risks undertaken by the insurer, who must maintain funded reserves at all times sufficient to satisfy accrued liabilities to holders of insurance contracts.[19] Following this model the benefits received by any worker insured under social security should bear a direct relationship to the tax contributions which he and his employer have paid. The particular insurance risk of the individual worker would not, however, influence the amount of his protection or benefits, inasmuch as social security is a compulsory program covering as a single-risk group economically-defined classes of workers. The social security program should maintain reserve funds adequate at any time to pay aggregate liabilities of all insured persons, computed on the basis of premium taxes paid.

The social security program never has followed the private insurance model. The Committee on Economic Security clearly saw that the social and political infeasibility of delaying benefits under the program until workers had paid in taxes adequate to finance their benefits: either the tax would be too high, the benefits too small, or the delay

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[17] Most of the countries of Western Europe initiated public programs of social insurance in the late nineteenth or early twentieth centuries. *See, e.g.*, SOCIAL SECURITY ADM., SOCIAL SECURITY PROGRAMS THROUGHOUT THE WORLD (1964).

[18] *See, e.g.*, J. PECHMAN, J. AARON & M. TAUSSIG, *The Objectives of Social Security*, in OLD AGE INCOME ASSURANCE, A COMPENDIUM OF PAPERS ON PROBLEMS AND POLICY ISSUES IN THE PUBLIC AND PRIVATE PENSION SYSTEM SUBMITTED TO THE SUBCOMM. ON FISCAL POLICY OF THE JOINT ECONOMIC COMM., 90th Cong., 1st Sess., Part III: Public Programs [hereinafter cited as COMPENDIUM] 5, 13-15 (1967). "In place of the insurance analogy, social security should be regarded as an institutionalized compact between the working and nonworking generations, a compact renewed and strengthened by every amendment to the original Social Security Act." *Id.* at 19.

Cf. National Ass'n of Life Underwriters, *Resolution Against Continued Use of Insurance Terminology in Social Security Act*, in SOCIAL SECURITY: PROGRAMS, PROBLEMS, AND POLICIES, 554 (W. Haber & W. Cohen eds. 1960).

[19] *See, e.g.*, R. MEHR & E. CAMMACH, PRINCIPLES OF INSURANCE 788-92, 835-42 ( ).

too long.[20] Over the years it has become equally clear that it is not practical for the reserve trust fund to be maintained at private insurance levels;[21] the current operations of the program have been estimated to require a fund of nearly 400 billion dollars to meet all liabilities to all insured persons at any time.[22] Invested in United States obligations such an amount would play a superdominating role in the government securities market, not to mention government policy, and shift a substantial part of the cost of the social security program to the general tax revenues appropriated to pay the interest on the obligations.[23] More-

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[20] See testimony of Professor Witte, *1935 House Hearings* 98-99. Although the original Act postponed the payment of monthly benefits until 1942, Social Security Act § 202(a) superceded), the Social Security Act Amendments of 1939, 53 Stat. 1360, moved the starting date to 1940. "So long as only taxes are payable and monthly benefits are postponed, the general public is under a misapprehension as to the financial operations of the plan and lacks a concrete demonstration of the effectiveness of the plan in providing protection. The recommendations of this committee with respect to the old-age insurance plan [to advance the starting date two years], it is hoped, will help to improve the understanding of the aims of a contributory social-insurance plan." HOUSE COMM. ON WAYS & MEANS, SOCIAL SECURITY ACT AMENDMENTS OF 1939, H.R. Rep. No. 728, 76th Cong., 1st Sess. 6-7 (1939) [hereinafter cited as 1939 HOUSE REPORT].

[21] In 1939, pursuant to the recommendation of Treasury Secretary Morganthau to Congress "that it plan the financing of the old-age-insurance system with a view to maintaining for use in contingencies an eventual reserve amounting to not more than three times the highest prospective annual benefits in the ensuing five years," *Hearings Relative to the Social Security Amendments of 1939 Before the House Comm. on Ways & Means*, 76th Cong., 1st Sess., vol. 3 at 2113 (1939) [hereinafter cited as *1939 House Hearings*], any prior preference for a reserve structure comparable to private insurance was dropped, and pay-as-we-go began. *See infra* text at notes 25-29.

[22] Buchanan & Campbell, *Voluntary Social Security*, Wall Street Journal, Dec. 20, 1966, at 14, col. 3. The sum of the investments and cash balances held in the four separate old-age and survivors, disability, hospital insurance, and supplementary medical insurance trust funds was $27,616 million at the end of October 1967. The old-age and survivors trust fund accounted for nearly $25,000 million of that amount. Social Security Adm., *Current Operating Statistics*, Tables M-5—M-7, BULLETIN, Feb. 1968, at 38-39.

[23] Assuming a trust fund of $400 billion and using the 3.66% average yield of trust fund investments at the end of 1966, HOUSE COMM. ON WAYS & MEANS, SOCIAL SECURITY AMENDMENTS OF 1967, H.R. REP. No. 544, 90th Cong., 1st Sess. 86-87 (1967) [hereinafter cited as 1967 HOUSE REPORT], the interest payable out of general tax revenues would be $14,667 million. The total monthly social security benefits paid from November 1966 through October 1967 was $20,963.3 million. SOCIAL SECURITY AD., *Current Operating Statistics*, Table M-1, BULLETIN, Feb. 1968, at 34. Since the actual investment of $400 billion in government obligations is unfeasible and unwise, carrying paper reserves in that amount would be a gimmick for transferring a substantial portion of the costs of social security to general revenues.

over, the purpose of private insurance reserves—to be able to honor the contractual rights of policyholders—does not pertain to public schemes of social insurance.[24]

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[24] Social insurance is sometimes compared unfavorably with private insurance because it does not vest the insured person with a contractually-enforceable right to benefits. *See, e.g.*, COMPENDIUM 18; N. 21. The legal rights under private and public schemes simply are not comparable. Under the former the insured person and his beneficiaries can obtain legal sanction to enforce their rights under contract. If the transaction is within the protection of a constitutional prohibition against the impairment of contracts, they enjoy a right to be free from legislative impairment of the contract's enforceability. They do not, of course, have any legal right to the continued solvency of the insurer or to any modification in their contractual agreement with him because of unanticipated social and economic changes.

The legal rights of a person protected by social insurance are scarcely nonexistent. He has the aid of the courts in enforcing his rights to entitled benefits. *See* Social Security Act § 205(h). While he does not have a constitutional right to receive social insurance, on the theory the government owes him a living, or any right to enforce the adhesive social insurance "contract" to which he is a compulsory party, on the theory he has a property interest in it, he is constitutionally protected against injury by arbitrary unreasonable legislative modifications of statutory rights to the insurance. "We must conclude that a person covered by the [Social Security] Act has not such a right to benefit payments as would make every defeasance of 'accrued' interests violative of the Due Process Clause of the Fifth Amendment. This is not to say, however, that Congress may exercise its power to modify the statutory scheme free of all constitutional restraint. The interest of a covered employee under the Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause." Flemming v. Nestor, 363 U.S. 603, 611 (1960). The extent of the socially insured person's due process or equal protection rights unfortunately is not clear. The *Nestor* case, the Supreme Court's only ruling on individual rights under the Social Security Act, is very unsatisfactory in suggesting broad limits within which Congress is free to roam in imposing restrictions on benefit entitlement; the decision on the issue in the case, whether a deported alien can be deprived of benefits for which he has paid tax contributions, turned significantly on whether the deprivation was an unconstitutional punishment. It is likely that the 5-to-4 decision against claimant Nestor would not stand if the case were reheard today.

It is clear, however, that Congress is authorized constitutionally to remove inequities and unfairnesses from the social security program at the expense of individual rights to benefits. Bernstein v. Ribicoff, 299 F.2d 248 (3d Cir. 1962), *cert. den'd*, 369 U.S. 887 (1962). It is also clear that it cannot impose a loyalty oath as a condition to entitlement to benefits. Reed v. Gardner, Civil No. 66-1223-TC, S.D., Cal., (Nov. 14, 1966); *see*, WELFARE L. BULL., Feb. 1967, at 8, col. 1.

Court decisions under state constitutional provisions similar to the federal guarantees of due process and equal protection have imposed restraints on the methods of reducing social welfare benefits because of lack of governmental funds. *See, e.g.*, Collins v. State Board of Social Welfare 248 Iowa 369, 81 N.W.2d 4 (1957) (reduction in monthly aid to dependent children payments held denial of equal protection). Other decisions have held administrative conduct unlawful under statute without the necessity of moving to constitutional issues.

The principle followed by the social security program in place of the private insurance model has been essentially pay-as-we-go, but pay-as-we-go according to an "actuarially sound" relationship between tax contributions and benefit payments.[25] Actuarial projections of expenses are made for seventy-five years into the future.[26] On the basis of the

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In the final analysis the difference between private and social insurance with respect to legal rights lacks importance in contrast with the relative economic protection involved. The increases in social security benefits to adjust for inflationary trends, for example, tend to offset the contractual right to static annuities under private insurance.

[25] The originators of the Social Security Act anticipated the possibility that general tax revenues might be necessary in the future to meet deficits in benefit payments over contributions income and trust fund reserves. *See, e.g.*, 1939 HOUSE REPORT 17 (1939). Although such a notion is compatible with a pay-as-we-go principle, *see id.* at 113-14, and was in fact provided for by the Revenue Act of 1943, 58 Stat. 93, § 902, which added to § 201(a) [superceded] of the Act the sentence "There is also authorized to be appropriated to the Trust Fund such additional sums as may be required to finance the benefits and payments provided under this title," the resort to general revenues as an alternative or contingency financing means has since been abandoned, and the abovementioned authorization was removed by the Social Security Amendments of 1950, 64 Stat. 477. The resistance to departing from total self-financing is strong. "Financial integrity is of great importance in a social insurance system. Any public benefit scheme must have built-in protections against the demands of the irresponsible, the charlatan, the demagogue, and the do-gooder. This is accomplished by consistently relating benefits to costs and by making those protected pay the costs of their own protection. [*But cf. supra* n. 18.] Some countries have learned this bitter lesson through painful experience. Succumbing to demands for higher benefits with inadequate financing may have disastrous consequences." W. MITCHELL, SOCIAL SECURITY IN AMERICA 16 (1964). Mr. Mitchell was Commissioner of the Social Security Administration from 1959 to 1962.

Nevertheless, although hospital insurance under Medicare is funded entirely separately from but very similarly to the rest of the social security program, the cost of supplemental medical insurance is shared equally by premium payments of voluntarily insured persons and by appropriations from general tax revenues. The accounting is managed through a trust fund arrangement, and there has been statutory provision for a contingency reserve fund. See 1967 HOUSE REPORT 75.

[26] 1967 HOUSE REPORT 78. For establishing the actuarial soundness of funding hospital insurance benefits, estimates are made for only 25 years into the future "because of the greater difficulty in making forecast assumptions for a service benefit than for a cash benefit." *Id.* at 66. The medical insurance part of Medicare, however, is financed on a "current cost" basis. *Id.* at 75-76. Consequently the Secretary of Health, Education and Welfare is authorized to set annually the premium rate for supplemental medical insurance on the basis of benefit and premium costs. Social Security Act § 1939, *as amended*, 81 Stat. 821, § 145(d) (13 U.S.C. CONG. & AD. NEWS 4619-4620, Jan. 20, 1968). The Secretary has set the rate for months after March, 1968, and before July, 1969, at $4, 32 Fed. Reg. 21044 (Dec. 30, 1967), thereby increasing the initial rate set in 1965 enactment of medicare by $1 per month. Social Security Act § 1939 (superceded).

projections tax rates are adjusted to benefit rates so that an "actuarial balance" is maintained, *i.e.*, so that "estimated future income from contributions and from interest earnings on the accumulated trust fund investments will, over the long-range period considered in the valuation, support the disbursements for benefits and administrative expenses."[27] By application of this formula the size of the trust fund depends upon the contributions-benefits projections and the program's actual experience. When the number of covered (taxed) workers increases at a rate exceeding the growth of beneficiary ranks, the reserve trust fund increases; when the relationship between the rates of change reverses, so that tax contributions decline while benefit payments increase, the fund diminishes. While the program has been reaching the maturity of participation by insured persons throughout their working lives, the fund has remained relatively small;[28] however, it is predicted that the increases in the tax rate and tax base, coupled with the influx of new workers during the next decades, will cause the fund to increase substantially in order to provide against the possibility of a major negative trend in the income-outgo balance after the year 2000 or 2025.[29]

The subordination of consideration of trust fund size to maintenance of actuarial balance is the source of much criticism among economists, who argue strenuously that the substantial imbalance of tax contributions over benefit payments in any year creates a "fiscal drag" by removing cash flowing in the economy to the frozen immobility of the trust fund. It is counterargued by social security spokesmen that the ebb and flow of the trust fund has a desirable dampening effect on business cycles, taking money out of the economy during times of boom and pumping it in during times of recession.[30]

The issue of "actuarial soundness" and its implications is not, however, the major focus of the current apprehension that the social security program is drifting off course. The fundamental questions raised are *who* pays and *who* benefits as-we-go, and who does *not* pay and who does *not* benefit. The person employed steadily throughout his working life at wages near the maximum amount subject to social security tax

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[27] 1967 HOUSE REPORT 78.

[28] *See* SOCIAL SECURITY ADM., BULL., ANNUAL STATISTICAL SUPP., 1965, Tables 28, 29, at 31-32 [1967] [hereinafter cited as 1965 Statistical Supp.].

[29] *Cf.* 1967 HOUSE REPORT 89-95.

[30] *See* D. CORDTZ, *op. cit. supra* n. 5 at 207.

bears the brunt of the cost of the program.[31] The wealthier individual does not make a larger tax contribution, and the poorer individual, whose contributions are smaller because he has less taxable income, receives proportionately greater benefits. The rates of monthly allotments, although based on the insured person's average earnings in covered employment, have never varied directly with his tax contributions but instead have favored the low-income worker.[32] Over the years as Congress has raised benefits the disparity in the payment schedule has increased.[33] With the extension of program coverage to such chron-

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[31] The income taxed for social security contributions was originally set at $3,000 per year, raised to $3,600 in 1950, to $4,200 in 1954, to $4,800 in 1958 and to $6,600 in 1965. The 1967 Social Security Amendments increase the amount to $7,800, effective Jan. 1, 1968. Social Security Act § 209(a), *as amended,* 81 Stat. 821, § 108(a) (13 U.S.C. CONG. & AD. News 4588, Jan. 20, 1968). The tax rate, which is not graduated over the tax base, has also increased, ranging from 2 percent at first, to 8.8 percent in 1968, to a projection of 11.8 in 1987 and thereafter. *See* INT. REV. CODE of 1954, §§ 1401, 3101, 3111(b), *as amended,* 81 Stat. 821, § 109 (13 U.S.C. CONG. & AD. NEWS 4590, Jan. 20, 1968). The rate, divided equally between the tax on the employer and the tax on the employee, currently exceeds the assessment of self-employed individuals by 37.5 percent.

[32] Under the original Act benefits were computed as percentages of total income, not exceeding the social security taxable amount of $3,000 in any year, earned by a worker between Jan. 1, 1937 and the date he first became eligible for benefits at age 65 (Jan. 1, 1942, when monthly payments were to begin, or thereafter). He was to receive ½ of 1 percent of total wages up to $3,000, 1/12 of 1 percent of total wages from $3,000 to $45,000. This scheme was never followed because the 1939 Amendments to the Social Security Act, 53 Stat. 1360, introduced a new way of computing monthly benefits, the forerunner of the average monthly wage formula developed in 1950 and thereafter. It had been realized that the accumulated earnings basis favored the worker who earned high wages for brief periods of covered employment, a loophole favoring workers not covered under social security. See testimony of ARTHUR ALTMEYER, Chairman of the Social Security Board, 1939 *House Hearings* vol. 1, at 54-60. Although the loophole continues to exist, especially in favor of workers principally covered under a separate benefit program, *i.e.*, government employees, the conversion to an average-monthly-income benefit basis, plus the expansion of coverage to include most employment, has substantially closed it.

[33] Under the benefit scale for social security payments, Social Security Act § 215(a), *as amended,* 81 Stat. 821, § 101(a) (13 U.S.C. CONG. & AD. NEWS 4576, Jan. 20, 1968), the primary insurance benefit amount is 73.9 percent of an average monthly wage of $75; 71.5 percent, $100; 58.9 percent, $150; 50.8 percent, $200; 41.8 percent, $300; 35.9 percent, $400; and 34.0 percent, $600. Because an average monthly wage can be based only on income taxed for social security purposes, and because the ceiling on taxable income has been substantially lower than the current $7,800 per year during most of the working life of persons presently qualifying for benefits, *see supra* n. 31, the number of workers with high average monthly earnings, and hence proportionately small benefits, is small. However, among workers retiring during Sept.-Dec. 1965, 50 percent had average monthly wages of nearly $300 or higher, including 8 percent with average monthly wages of $400 or over. *See* 1965 Statistical Supp. Table 47, at 46.

ically underpaid workers as farm laborers and domestic employees the number of proportionately high benefit recipients has also climbed.[34] Moreover, the family man, whose dependents and survivors have been entitled to benefits, is afforded greater insurance protection at the same tax rate than the bachelor with no dependents.[35]

It has been asserted that the inequities between tax contributions and benefit entitlement have reached the point that it would be cheaper for many persons now entering the work force to purchase equivalent

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[34] Thirteen percent of the workers retiring in the Sept.-Dec. period of 1965 qualified only for the minimum benefit of $44 (raised to $55 by the 1967 Amendments), which could have been based on an average monthly wage as low as $16.67 (or lower) of which the minimum benefit is 264 percent. *Id. But see supra* n. 32. In addition, 42,500 because entitled during the same time, *id.* to a basic monthly benefit of $35 under transitional insured status, incorporated into the Social Security Act in 1965 to afford protection to men born before 1892 and women born before 1895 with less than the six quarters of work in covered employment otherwise necessary to qualify for retirement benefits. The transitional insured status was extended in 1966 by amendment enacted as a rider to the Tax Adjustment Act. The amendment represents a departure from the credo of social security in two ways: first, it provides benefits to persons attaining the age of 72 before 1968 who are without any quarters of coverage; second, it requires a reduction in benefits for any other government benefits which an otherwise entitled person may receive, *e.g.*, public assistance benefits. Social Security Act § 227, *as amended,* 81 Stat. 821, § 302(a) (1966), *as amended,* 81 Stat. 821.

"Although the law provides for higher cost-benefit ratios for persons with higher average annual incomes up to the maximum wage base, there are several offsetting factors that may, in fact, reduce cost-benefit ratios for the higher income groups and raise them for the lower income groups. Higher income groups probably live longer on the average than lower income groups and thus collect benefits for a longer period of time. Also, the exclusion of social security old-age benefits from Federal income taxation raises the benefits of higher income groups relative to the taxes paid in. Eventually persons with low incomes will pay in taxes for a larger number of years because they typically start to work at a younger age. Also, if there is a larger percentage of working couples among lower income groups than among higher income groups, this would tend to raise cost-benefit ratios for the lower income groups. In addition, the work income test which excludes some persons who work after 65 from receiving old-age benefits may affect the lower income groups more adversely than the upper income groups." C. CAMPBELL & R. CAMPBELL, *Cost-Benefit Ratios under the Federal Old-Age Insurance Program,* COMPENDIUM 72. *See also infra* n. 35.

[35] Although benefits are payable to dependent spouses, children and parents at rates varying from 50 to 82½ percent of the insured worker's primary insurance amount, there is a "maximum family benefit" ceiling which limits the total sums payable on a single earnings record at any time. The ceiling varies from 150 percent to about 214 percent of the primary insured amount, depending on the size of the primary insurance amount. Because the lowest percentage applies to the minimum monthly benefit of $55 (but the highest to a monthly benefit of about $165, not to the maximum monthly benefit of $318), the restriction tends to disfavor the lower-income person. *Cf. supra* text at n. 33. *See* Social Security Act § 215(a), *as amended,* 81 Stat. 821, § 101(a) (13 U.S.C. CONG. & AD. NEWS 4576, Jan. 20, 1968).

private insurance coverage than to participate in the public social security program.[36] Of course, this comparison overlooks the fact that present tax contributions pay for present benefits to persons who have contributed into the program for shorter periods of time at lower rates. Most current beneficiaries have in this way realized a net gain over what private insurers could offer. Although the regularity of legislated increases in the past cannot guarantee future Congressional behavior, persons now entering the work force presumably will receive, in course, expanded protection and benefit rate hikes which, even if less spectacular than past advances, will go far toward eliminating the present seeming cost advantage of private insurance.[37]

Notwithstanding the comparative advantages of lower-income workers under social security, the non-availability and inadequacy of money grants to poverty-ridden people continues. The one-in-ten worker who is not covered by social security or a similar government protection plan is for the most part the unemployed or underemployed person;[38] a

[36] *See, e.g.*, BUCHANAN & CAMPBELL, *Voluntary Social Security*, Wall Street Journal, Dec. 20, 1966, at 14, col. 3; C. STEVENSON, *"How Secure Is Your Social Security?"* READERS DIGEST, Oct. 1967, at 75; *cf.* C. CAMPBELL &. R. CAMPBELL, *Cost-Benefit Ratios under the Federal Old-Age Insurance Program*, COMPENDIUM 72.

[37] Even if the social security program is regarded as an arrangement whereby present workers pay for benefits to past workers, raising an obligation on future workers to pay taxes for benefits to or on behalf of present workers when they retire, die, or become disabled, see J. PECHMAN, J. AARON & M. TAUSSIG, THE OBJECTIVES OF SOCIAL SECURITY, COMPENDIUM 5, the question remains whether future workers will be able to maintain the present trend of the middle-class's paying the way, in part, of lower-income workers. *See* C. CAMPBELL & R. CAMPBELL, *Cost-Benefit Ratios under the Federal Old Age Insurance Program*, COMPENDIUM GB. From this point of view it can be argued that general revenues should be used to supplement the lower-income worker's tax payments so that they are equivalent to the higher-income worker's contributions. *Cf.* X. E. DERAN, *"Some Economic Effects of High Taxes for Social Insurance,"* COMPENDIUM 181, 195-201.

[38] Domestic and casual workers are within employment covered by social security if they earn $50 or more in cash from one employer within three months, farm laborers, $150 or more in cash from one employer in a year, and self-employed persons, netting $400 or more in a year (with an exception for farmers who net less than $400 but gross more than $600), Social Security Act §§ 209(g), (h), (j), 211(b)(2). It seems likely that these persons and other low-income, casual workers frequently do not pay social security tax (and their employers do not) and thus do not obtain coverage. The reasons are obvious: laxness in making payments and filing returns, need for obtaining maximum income now, fear of being caught for evading income taxes, and so on, in addition to the low-income self-employed person's difficulties in keeping adequate business records. *See, e.g.*, Jose Rodriguez v. Gardner, 1A UNEMP. INS. REP. ¶ 14,809 (Digest of Social Security Hearing Examiner's Decision, *aff'd* Dist. Ct., D.P.R., Civ. No. 2-67, June 27, 1967). The reason why Congress, contrary to recommendation, refused in 1935 and 1937 to include within covered employment services of employees earning nominal amounts, *i.e.*, farm, domestic, and casual workers, was "in order to eliminate the nuisance cases of inconsequential tax payments." 1939 HOUSE REPORT 2.

dependent family without a dead or severely disabled breadwinner covered by social security receives no protection under the program at all;[39] the monthly income of a social security beneficiary, especially one at the lower end of the rate scale, is woefully inadequate to maintain a minimally decent standard of living;[40] and earned income which might be used to augment inadequate benefits is offset at such a high rate that it tends to discourage the beneficiary from working or to encourage his acquiescence in sub-standard wages.[41] Public assistance, which was supposed to wither away with the development of social security,[42] affords some assistance where social security fails, but its protection is subject to nearly the same deficiencies.[43]

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[39] *But cf.* Secretary v. Meza, 368 F.2d 389 (9th Cir. 1966); Newman v. Gardner, 263 F. Supp. 58 (E.D.N.Y. 1967) (survivors' benefits allowed because of seven years' unexplained absence of wage-earner).

[40] "Social insurance is not intended to do more than to serve as a base upon which people can build, by their own means, the kind of security to which they aspire. It should encourage personal saving, home ownership, and should not compete with the private sales of life insurance; rather, it should stimulate them." W. MITCHELL, SOCIAL SECURITY IN AMERICA 16 (1964). Why not provide a floor of benefits at, say, $200 per month for a small family, in order to protect lower-income people who cannot or will not use social security benefits as a base on which to build?

[41] If a beneficiary's earnings exceed $1,680, he loses $1 in benefits for each $2 earned from $1,680 to $2,880, and $1 for $1 above that amount. Social Security Act § 203(f), *as amended*, 81 Stat. 821, § 107(a)(1) (13 U.S.C. CONG. & AD. NEWS 4588, Jan. 20, 1968). Prior to the 1967 Social Security Amendments the amounts were, respectively, $1,500 and $2,700.

[42] The failure of social security to replace the dole of public assistance with self-financed relief, repeated avowals to the contrary notwithstanding, has been well exposed in G. STEINER, SOCIAL INSECURITY: THE POLITICS OF WELFARE, Ch. II, *The Withering-Away Fallacy* (1966) [hereinafter cited as STEINER]. However, if attention is limited to social security's principal benefits, old-age payments, the program has weathered well: in 1940, .7 percent of the population over 65 received social security, while 21.7 percent enjoyed public assistance; in 1965, after steady trends upward and downward respectively, 75.2 percent received social security but only 11.7 percent obtained public assistance. In the latter year 44.4 percent of the public assistance recipients also received social security, which was inadequate to permit its beneficiaries from rising above the state public assistance subsistence income need level. 1965 Statistical Supp. Table 16, at 14. Public assistance has not withered away, however, where social security does not serve, *e.g.*, to families with dependent children whose breadwinner is unemployed or never has existed.

[43] In 1965 only 18 states had adopted programs for aid to families with dependent children (AFDC) deprived of support by a parent's unemployment (AFDC-U), although federal grants-in-aid were available, STEINER, 81; 34 states paid less than 100 percent of need—as established by their own subsistence living standards—of AFDC families, DEPARTMENT OF HEALTH, EDUC. & WELFARE, BUREAU OF FAMILY SERVICES, MONTHLY COST STANDARDS FOR BASIC NEEDS USED BY STATES FOR SPECIFIED TYPES OF OLD-AGE ASSISTANCE CASES AND FAMILIES RECEIVING AID

The present course of the social security program is thus damnable from right and left: the more it drifts toward aiding the poor, the more regressive a tax burden it levies upon the middle class; the tax burden on the middle class increases, but the poor are not adequately assisted. Public assistance can be said to pose a comparable dilemma, substituting for the insured worker's social security tax contributions the state's share of the combined federal-state public assistance funding: the poorer the state, the greater the need for improved public assistance; the poorer the state, the less its ability to increase tax revenues to make the improvements.[44] The currently popular but not new solution for the dilemmas is the guaranteed income, or negative tax plan, which assures a subsistence or greater income to all persons in poverty regardless of the reason for their need or other qualification upon their eligibility.[45]

Although specifications for guaranteed income differ widely from plan to plan,[46] the dominating considerations in them reflect the professional biases of their economist proponents, that is, the costs of the program, its relationship to the entire economy, and the levels of in-

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TO FAMILIES WITH DEPENDENT CHILDREN, January 1965 (1965); the national average public assistance monthly grant did not exceed $100 per month per recipient and averaged only $35.53 monthly per capita of AFDC families, 1965 Statistical Supp. Table 109, at 104; eligibility for, and amount of, public assistance recipients was affected by earned income exceeding the following "income disregards:" $85 plus one-half thereabove for the blind, $20 plus one-half of next $60 for the aged and disabled, and $50 for each child (but not parent) in AFDC. Social Security Act §§ 2(a)(10), 402(a)(7), 1002(a)(8), 1402(a)(8), 1602(a)(13-14).

[44] A solution for this dilemma is federal revenue sharing with the states. *See* W. HELLER, NEW DIMENSIONS OF POLITICAL ECONOMY (1966); *cf.* M. NOLAN, *"Walter Heller's Federalist Papers,"* Reporter, June 1, 1967, at 13, L. KEYSERLING, *"Sharing Revenue with the States,"* NEW REPUBLIC, Mar. 25, 1967, at 14.

[45] Almost everyone and every body making the welfare scene in these times has gone on record in favor of some kind of guaranteed income, negative income tax, family allowance, demogrant, etc., from such old-line social welfareites as Professor Eveline Burns and Undersecretary Wilbur Cohen to such disparate economists as Milton Friedman and Robert Theobald, from the Ripon Society to the National Commission on Technology, Automation and Economic Progress; from the president of the Ford Motor Company, Mr. Arjay Miller, to the President of the United States, Mr. Lyndon Johnson; from the Commission on Law Enforcement to [Commission on Riots] and so on. On the one hand, some of the record-making is more protest than proposal. On the other hand, the concept of the guaranteed income and its fellow-travelers is very versatile. *See* R. VILES, *"The War on Poverty: What Can Lawyers (Being Human) Do?"*, 53 IOWA L. REV. 122, 157-60 (1967).

[46] *Id.*

come maintenance that should be set.[47] Necessary implications of any proposal include its relationships to public assistance, social security, and other existing welfare programs: will or should any or all of them be eliminated, substantially reduced, or otherwise drastically changed? The responses to this question have varied substantially, both because the economic and bureaucratic problems of integrating any guaranteed income plan with existing programs are difficult and because preferences of plan proponents for the impact of their creations on non-economic values tend to diverge widely, to the extent that they consider them at all.

It cannot be gainsaid that new arrangements should be designed to distribute more equitably the burdens of public assistance and social security. Increased reliance upon general tax revenues of the federal government seems inevitable. The feasible alternatives include both new programs, such as guaranteed income plans, and new funding techniques for existing programs. In choosing among alternatives it is important to recognize that in issue are values other than economic ones. During the prevalence of economists as the idea men for solving the welfare problem it was easy to minimize the plain fact that both social security and public assistance rest upon two value choices in addition to the goal of assuring economic security, i.e., preservation of the work ethic and enforcement of primary family responsibility. Social security requires at least some work experience for even nominal entitlement to benefits, the scope of which extends to family members within the breadwinner's traditional duty to support. Public assistance has departed to a degree from reinforcement of work and family values in recognition of its function as the primary national welfare program for direct relief on the basis of need. However, most of the restrictions on the availability of public assistance to persons demonstrably in need seek, however ineffectively, to sanction the work and family responsibility values by denying or reducing aid to those who can work and/or spurn the family breadwinner institution.[48] The restrictions on public assistance eligibility removed by administrative and court action during recent years have affected other values, *e.g.*, the right to privacy,[49] non-

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[47] *See, e.g.*, J. TOBIN, J. PECHMAN, P. MIESZKOWSKI, Is C. *Income Tax Practical?* 77 YALE L.J| 1 (1967); *Negative* GREEN, NEGATIVE TAXES AND THE POVERTY PROBLEM (BROOKINGS INSTITUTION STUDIES OF GOVERNMENT FINANCE 1967).

[48] *See supra* n. 43.

[49] *See, e.g.*, Parrish v. Civil Serv. Comm'n, 57 Cal. R. 623, 425 P.2d 223 (1967); WELFARE ADMINISTRATION, FEDERAL HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION, Part IV, §§ 2200, 2230 (Jul. 1, 1967); *but cf.* Smith v. Board of Comm'rs, 380 F.2d 632 (D.C. Cir. 1967).

discrimination because of race,[50] and interstate mobility.[51] Although in part they cannot be regarded as more than attempts to save money,[52] the highly controversial public assistance provisions in the Social Security Amendments of 1967 clearly seek to strengthen these values as public assistance affects their achievement.[53] In this light the action of Congress can scarcely be regarded as irrationally and inhumanely punitive.

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[50] *See, e.g.*, Smith v. King, 277 F. Supp. 31 (M.D. Ala. 1967), *prob. juris. noted*, 88 S. Ct. 821, (Jan. 22, 1968); *stay vacated*, 88 S. Ct. 842 (Jan. 29, 1968).

[51] *See, e.g.*, Shapiro v. Thompson, 270 F. Supp. 331 (D. Conn. 1967), *prob. juris. noted*, 36 U.S.L.W. 3278 (Jan. 15, 1968); Green v. Dep't of Public Welfare, 270 F. Supp. 173 (D. Del. 1967).

[52] The clearest example of prima-facie budget-cutting is the restriction of the federal share of monthly AFDC payments to the number of children in a state that bears the same ratio to the total population of children in the state as existed in the first quarter of 1968. 81 Stat. 821, § 208 (13 U.S.C. CONG. & AD. NEWS 4662, Jan. 20, 1968), amending Social Security Act § 403. The restriction, scheduled to become effective on Jul. 1, 1968, may be delayed by Congressional Action because of administrative difficulties in implementing the job training and incentive amendments upon which the restriction was designed to force the states to rely in caring for the needy. Louisville Courier-Journal & Times, Mar. 3, 1968, § 1, at 22, col. 2. Its constitutionality is of course questionable.

[53] In brief, the Amendments seek to place every able bodied welfare recipient not handicapped by age, disability, or blindness, *i.e.*, parents of children receiving assistance under AFDC, in regular employment, job training programs, or special work projects; provide day-care centers for children of working parents; require the first $30 of earned income of AFDC adults and one-third thereabove, and all income of AFDC children attending school, to be disregarded in determining the eligibility of the family for public assistance; strengthen legal enforcement of absent parents' duties to support their children; promote family planning; and expand foster care of neglected, abused, and exploited children. 81 Stat. 821, §§ 201-213 (13 U.S.C. CONG. & AD. NEWS 4642-4667, Jan. 20, 1968), *amending* Title IV and other Titles of the Social Security Act. The greatest public outcry against the Amendments, beyond the attack in the AFDC cash allotment restriction described in the preceding note, has centered upon the clear implication that mothers of AFDC children, including perhaps very small children, will be forced to go to work to support their families, thus depriving their children of a decent upbringing. While this plaint registers sympathy, it is relevant to consider that the middle class, admittedly by choice as well as by necessity, commits its children in large numbers to the care of nursury schools, relatives, and housekeepers. The real problem, and the more probable reality behind the proclamations of the Amendments, is not forcing middle class ethics upon the poor or depriving them of their sometimes glamorized and ever time-honored nobility. It is instead that the apparatuses of state public assistance programs will be no more able (or willing?) to march under the new banners than they have been able to progress in the past. The Amendments provide for the usual improvement in family services, child and maternal care, and training of social workers, both professional and sub-professional, 81 Stat. 821, §§ 301-306, 401-405 (13 U.S.C. CONG. & AD. NEWS 4695-4709, Jan. 20, 1968), but

The indictments of public assistance have well publicized the policies and practices of the program which inhibit applicants and recipients from working to earn their own way and which tend to fracture families so that the dependents of jobless men can qualify for aid. As recommendations for guaranteed income plans move from academic conception and debate to comprehensive proposals for legislative action, the provision for earning incentives and the specification of family and other units for applying standards of income maintenance become more prominent.[54] In the current public debate over the social security program, however, the worth of the program for its reinforcement of work and family responsibility values has been subordinated to the clamor over the disadvantaged position of the middle class in financing it.[55] Yet, through the liberalization of dependents' entitlement qualifications to include more and more illegitimate and adopted children, dependent spouses, and other relatives,[56] and through the

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> [O]ne must not underestimate the inherent ennui of a massive, thoroughly entrenched bureaucracy. The welfare reformers are a distinct minority. The welfare appartus is enormous: It extends from Washington to the capitals of every state to every backwater county in the nation. It provides jobs for thousands of administrators, caseworkers and clerks—most of whom are political patronage appointees or civil service insecurists who aren't even trained social workers, much less reformers, and who would be perfectly content with the present system if only the critics would leave them alone.

Welfare Begins to Applaud the Critics, J. Barnett, Wall Street Journal, Feb. 26, 1968, at 12, col. 3.

[54] See authorities cited *supra* n. 47.

[55] A large share of the clamor is directed to the integration of social security retirement benefits with private pension plans, a matter of considerable concern to the private pension industry as social security taxes increase, and to the income tax treatment of social security and other retirement income. *See, e.g.*, Bok, *Emerging Issues in Social Legislation: Social Security*, 80 HARV. L. REV. 717 (1967); MATERIALS PREPARED BY THE COMM. STAFF FOR THE SUBCOMM. ON FISCAL POLICY OF THE JOINT ECONOMIC COMM., OLD AGE INCOME ASSURANCE: AN OUTLINE OF ISSUES AND ALTERNATIVES, 89th Cong., 2d Sess. (1966); M. BERNSTEIN, THE FUTURE OF PRIVATE PENSIONS (1964).

[56] The Social Security Act provides benefits to the following dependents: wives, including divorced wives; husbands; legitimate, about-to-be legitimate, illegitimate, step-, adopted and about-to-be adopted children, dependent on either mother or father, and including students to age 22; widows, including "surviving wife divorced"; widowers; unremarried mothers with child of the deceased wage-earner in her care, including "surviving divorced mothers"; and parents. The statutory provisions governing the eligibility of these individuals as their particular relationships to and dependencies on the insured wage-earners may exist defy simplified description. It can be stated, however, that expansion of eligibility has been continual, extending through the 1967 Social Security Amendments, which broadened the entitlement of, among possible others, widows and widowers, children dependent on their mothers, and children adopted by disabled workers and surviving spouses.

provision for benefits for work incapacity caused by disability,[57] the program has moved ahead in providing benefits, however inadequate, that reward steady work and breadwinner responsibility. The program expansion, especially the addition of disability benefits, has undoubtedly aided poor people disproportionately to the middle class.

It is therefore highly relevant to assess the effectiveness of social security as an anti-poverty program. With appropriate refinancing could it become the primary "permanent" public provision for income assistance, leaving to highly flexible, specialized efforts, perhaps conducted within reordered and reactivated public assistance programs, the problems of improving employment and family responsibility of the poor? In what direction is the administration of the program leading, and how does the direction affect the poor?

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[57] In 1954 Congress amended the Social Security Act to provide a "period of disability" or "disability freeze," analogous to "waiver of premiums" under a private insurance contract, which permitted a worker to omit from consideration in computing eligibility for and amount of retirement benefits any years in which he had not worked in covered employment as a result of inability to engage in substantial gainful activity because of impairments expected to last for a long time or indefinitely or to result in death. See Social Security Act §§ 216(i), 215(b), 213(a). In 1956 monthly benefits were authorized for persons disabled according to the 1954 definition, computing the amount of benefits as if the beneficiary had retired at age 65. Eligibility was limited, however, to persons aged 50 or older and to children of retired or deceased wage-earners, over 18 but disabled before turning 18. In 1958 benefits were extended to dependents of disabled workers, and in 1960 the age 50 limitation was dropped.

The 1965 Social Security Amendments broadened the disability standard to cover all impairments expected to last at least 12 months or to result in an earlier death and which disable the individual from engaging in substantial gainful activity. Special provisions were also enacted for the blind. 79 Stat. 286 § 303(a)(2), amending Social Security Act § 223(a)(2). The 1967 Social Security Amendments liberalized the definition of blindness, 81 Stat. 821, § 172 (13 U.S.C. CONG. & AD. NEWS 4641, Jan. 20, 1968), amending Social Security Act § 216(i); extended disability benefits to widows and widowers precluded by impairments from engaging in *any* gainful activity, 81 Stat. 821, §§ 104, 158(b), (13 U.S.C. CONG. & AD. NEWS 4581, 4630, Jan. 20, 1968); improved the standing of all younger workers for obtaining coverage to include disability insurance, 81 Stat. 821, § 105 (13 U.S.C. CONG. & AD. NEWS 4587, Jan. 20, 1968), amending Social Security Act §§ 216(i)(3), 223(c)(1); and made various other changes favorable to claimaints. *But cf.* the redefinition of "disability," discussed throughout this article, 81 Stat. 821, § 158(b) (13 U.S.C. CONG. & AD. NEWS 4641, Jan. 20, 1968), amending Social Security Act § 223. Congress rejected a recommendation to extend Medicare to disabled workers, ordering a further study of the proposal. See 1967 HOUSE REPORT 37, S. REP. No. 744, 90th Cong., 1st Sess. 63 (1967). 81 Stat. 821, § 140 (13 U.S.C. CONG. & AD. NEWS 4614, Jan. 20, 1968).

Disability beneficiaries returning to remunerative work may be allowed up to twelve additional months of benefits while they adjust to employment. Social Security Act § 222(c).

In beginning from the legal perspective of an assessment of social security as a welfare program, the phenomenon that attracts immediate attention is the sharp rise in the number of social security cases that in recent years have emerged, at the instance of plaintiffs whose claims for benefits have been denied, from the claims adjudication process of the Social Security Administration into the federal courts for judicial review.[58] Prior to the availability of disability benefits, beginning in 1957 and expanded in 1958, 1960, and 1965[59] relatively few cases arose from the anonymity of administration decision. In the last ten years the volume of litigation has multiplied. From July 1, 1963, to September 30, 1967, 4,299 civil actions for court review were filed.[60] Approximately eighty-five percent of the plaintiffs sought reversal of administrative denials of claims for disability benefits; many of the rest were dependency claimants similarly seeking reversal of adverse administrative action. Meanwhile, 21,885 persons in fiscal year 1965-66 and 19,725 persons in 1966-67 sought administrative hearings before Hearing Examiners after initial and reconsidered denials of their claims for benefits. The percentage of disability proceedings among these cases was also high, varying from eighty-nine percent to eighty percent in the two years.

Most of the claimants for disability benefits and many of the claimants for survivors and retirement benefits who have proceeded for administrative hearing or ultimately for court review have been poor people or nearly-poor people, *i.e.*, individuals whose incomes (with or without social security benefits) and cultural positions place them below anyone's poverty line or very close to it. For example, the distribution of disability beneficiaries, including both insured workers and their dependents, shows a direct correlation between average percapita income of a state and the percentage of its population receiving benefits, especially if the less industrialized Midwestern and Rocky Mountain states are removed from consideration.[61] Moreover, the federal judicial cir-

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[58] Social Security Act § 205(g).

[59] *See supra* n. 57.

[60] All statistical presentations of social security administrative and court claims proceedings made in this article are quoted from, or based upon, materials supplied to the author by the Social Security Administration except as otherwise noted. Letter and enclosures from Harold B. Siegel, Assistant Director, Bureau of Hearings and Appeals, Social Security Administration, to Robert M. Viles, Feb. 23, 1968.

[61] *See* 1965 Statistical Supp. Table 98, at 93. The number of disability beneficiaries, including both workers and dependents, in 1,000 of state population varied from under six in Connecticut to over 25 in West Virginia, excluding the Midwestern and Rocky Mountain states, where numbers varied between four and seven per 1,000 population. In addition, Alaska registered the lowest percentage of disability beneficiaries, 2.5 per 1,000 population, and Hawaii, 5 per 1,000. It is perhaps more than coincidental that West Virginia, whose 25/1,000 ratio far outdistanced the state next in order (Kentucky, at 17/1,000) is the only state officially defined to be entirely within the Appalachian Region.

cuits containing the Appalachian and Southern states, *i.e.*, the Fourth, Fifth and Sixth Circuits, have accounted for over seventy percent of all actions for review of administrative denials of disability claims. The reasons for these configurations are not difficult to identify. More persons in the eastern and western parts of the country have spent their working lives in highly organized employment covered by social security at physically arduous and mentally debilitating tasks, the very machine-like repetitiveness of which has so patterned their competence that without rehabilitation it is difficult for them to convert to other work. They are likely to be unemployable if they are cut off from their prior work by the occupational vicissitudes of sudden injury or disease or machine replacement.

In East Kentucky, for example, the typical disability claimant is, like Ed Sizemore, a former manual laborer in the coal mines, injured by the accidents of cave-ins or unguarded machinery or diseased by silicosis and other pulmonary afflictions, untrained for other, less physically demanding work, often barely literate or totally illiterate, and welded to his native region or community. The claimant is a poor man, and his poverty is widely shared by others like him, who are also the victims of the technological obsolescense of modern automated mining techniques which require fewer but more highly skilled workers. It should not be surprising that in the county of Ed Sizemore's residence, Clay County, Kentucky, where welfare benefits count as a principal source of income, the inhabitants rely as much on social security as on public assistance.[62]

II. Social Security As A Welfare Bureaucracy: The Poor Man As Social Security Drop-Out and Bureaucratic Misfit

Unlike state public assistance agencies the Social Security Administration of the Department of Health, Education and Welfare has largely escaped attack for failure effectively and humanely to assist poor people among its client-consumers. The reason for the lack of criticism lies largely in the relative excellence of the Administration's record in claims processing. It not only asserts that entitlement to social security benefits is a matter of right, it acts upon its words and promotes, not discourages, applications for benefits. In assisting claimants to establish entitlement to benefits it stands very favorably among all social welfare programs.

However, the Administration's operation of the social security program approaches the bureaucratic ideal of highly planned, minutely

[62] J. Fetterman, Stinking Creek 29, 30 (1967).

prescribed conduct to which most other welfare agencies can only aspire. In this sense it is a microcosm of the carefully ordered society that some thinkers have projected for the future, in which individual initiative, spontaneity, responsibility, and aberration are subordinated or sacrificed to the requirements of the ordained system and its dependable security. The structure and personnel of the Administration's process of claims determination are well-insulated from the vagaries of politics, and the impact of frequent Congressional changes in the Social Security Act are minimized by the prevailing spirit of measured gradualism and constant preplanning. Like any other well-maintained bureaucracy the Administration minimizes criticism and intervention by refusing to disclose information about the ways and results of its activities that might inspire public images contrasting with its own projections of serene beneficence and unquestionable competence.[63] [a]

In such an institution it is necessary that the external participants, here the claimants, fit the images of themselves which have been programmed into the system. They must apply for benefits when they are supposed to apply, in the numbers which have been anticipated, according to the bureaucracy's understanding of entitlement and its statistical analysis of the insured population. They must provide the correct information or evidence which establishes entitlement to bene-

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[63] All references in this article to the government agency which conducts the social security program are to the "Administration," although the "Secretary" of Health, Education and Welfare is the nominal repository of all authority under such legislation as the Social Security Act, and thus is the captioned defendant in all suits against the Administration to enforce claims, the promulgator of its regulations, and so on.

The Administration's Division of Public Inquiries "formulates, establishes, promulgates, and assesses Administration policy governing public correspondence" and "conducts studies and surveys to detect and evaluate Administration procedures and practices which may create misunderstanding, adverse public reaction or other public relations problems." Social Security Administration, *Statement of Organization, Functions, and Delegations of Authority*, 32 Fed. Reg. 10,458, 10,459 (daily ed. Jul. 15, 1967) [hereinafter cited as Administration Statement]. Whether the Administration's reticent benignness inures to the benefit of the millions of individuals about whom it keeps vast files of personal information is an open question. *Compare* J. Steinberg & H. Cooper, Social Security Statistical Data, Social Science Research and Confidentiality, Social Security Bull., Oct. 1967, at 3, *with* V. Packard, *Don't Tell It to the Computer*, N.Y. Times, Jan. 8, 1967, (Magazine) at 44.

The only investigation of the social security disability program conducted "in a spirit of openminded objectivity and with no preconceived conclusions with respect to the performance of any State or Federal agency or nongovernmental group" seems to have been the *Hearings before the Subcomm. on the Administration of the Social Security Laws of the House Comm. on Ways and Means*, 86th Cong., 1st Sess. 1 (1959).

fits. The most predictably dependable claimants are of course the middle-class, and the social security program in this sense as well as others is a typical middle class institution.

A poor individual is often inadequately prepared by education, awareness, and experience to play his expected role. The rural poor person isolated from the world beyond his home area is especially disadvantaged. The relationship between the local social security office and some nationalized bureaucracy in far-off Washington, or even the existence of the latter, may be beyond his comprehension and understanding. Moreover, any poor claimant because he is poor suffers in varying degrees from failure to lead the well-ordered, crisis-free life of the middle-class. He does not maintain or there is not maintained for him as accurate and complete record of vital statistics; he fails to be as fastidious about marital, parental, and other family relationships; he cannot prove as easily, fully, or definitively the chronology of his work in employment covered by social security insurance. He is more likely to suffer a variety of illnesses and injuries which, for lack of adequate medical attention or because of the aggravation of his prior work experience and environmental influences, achieve a degree of complexity and complication that in their total impact upon his ability to obtain or perform gainful activity cannot be easily assessed or clinically documented. When the casual relationship among his physical and mental impairments, his educational background and functional intelligence, and the technological obsolescense of his work capacity are taken into account, the determination of his disability quotient is more difficult than the determination of a skilled worker's disability caused solely by a major injury or illness.

It is clear that in order to function adequately as a social security claimant the poor person may need assistance, at least some of which should be rendered by attorneys, such as representation upon court review and perhaps representation at administrative hearing as well. The Social Security Administration, however, assumes a firm stand for the right of its clientele of insured workers and beneficiaries to *non*-representation by lawyers.[64] Like other middle-class institution-makers the

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[64] The following colloquy took place between Senator Long of Missouri and Mr. Charles M. Erisman, Director of the Bureau of Hearings and Appeals and Chairman of the Appeals Council, Social Security Administration at the *Hearing Before the Subcommittee on Administrative Practice and Procedure of the Sen. Comm. on the Judiciary*, 89th Cong., 2d Sess., on S. 1522, a bill "To Remove Arbitrary Limitations upon Attorneys' Fees for Services Rendered in Proceedings Before Administrative Agencies of the United States," Feb. 28, 1966 [hereinafter cited as *Hearing on Limitation of Attorneys' Fees*].

architects and custodians of the program have sought to displace the traditional lawyers' role on claims determination with the services of laymen. To a very large extent the program has attained this goal and has preserved its operations from the unsettling intermeddling of law-

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Senator LONG. Mr. Erisman, I understand that attorney fees is the only determination you make in the way he [the social security claimant] spends his money.

Mr. ERISMAN. We do not—that is true, Mr. Chairman—we do not, in any way, tell the claimant how he should spend his money.

Senator LONG. But you tell him he cannot spend it for attorney fees if he wants to.

Mr. ERISMAN. We try to administer the law.

Senator LONG. Isn't that the theory that is followed—that he can spend it for whatever purpose he wants other than for his attorney.

Mr. ERISMAN. That is true but we think there has to be a balance between the interests of the claimant and the interests of the attorney.

Senator LONG. Wouldn't that same thing be true of a doctor—doctors don't all charge reasonable fees, or the same fees. They charge different fees, do they not?

Mr. ERISMAN. That is true.

Senator LONG. Wouldn't a man be entitled to enploy a specialist or a general practioner? That would be for him to decide that he could do that.

Mr. ERISMAN. You have the medicare program which Congress just enacted last year and there is a provision there for paying the doctor a reasonable charge. To that extent there will be some slight control to cover the charges that are made.

Senator LONG. We are going to talk about doctors in just a minute. What do you consider a reasonable hourly rate for legal service?

Mr. ERISMAN. We don't use a reasonable hourly rate.

Senator LONG. What do you use? How do you determine what is reasonable?

Mr. ERISMAN. I have here the elements which we consider to be important in determining the fee—the amount of time he spends, the complexity of the case, the degree of his involvement in the case, the extent to which the attorney did a skillful job examining witnesses, the extent to which he may have prepared a brief.

Senator LONG. What do you think is a reasonable hourly fee for an attorney?

Mr. ERISMAN. I have to clarify a few things, Mr. Chairman.

I would not approach it from the standpoint of an hourly fee which would apply across the board.

Senator LONG. What criteria do you use in determining the basis of your fee that you will approve?

Mr. ERISMAN. Well, just the experience and judgment of individuals involved in this process over a period of years and not the judgment of just one person.

Senator LONG. Who decides it?

Do you have any regular commission or panel that makes that decision?

Mr. ERISMAN. Yes; the hearing examiner is permitted to authorize a fee of up to $300 [now $500] and where the fee that he proposes to authorize is in excess of $300 [now $500] we would ask for his recommendation as to what the fee should be and then that is considered by at least two members of the Appeals Council and if there is any disagreement between these two members either the Chairman or the Deputy Chairman of the Appeals Council will also become involved . . .; *Id.* at 24-25; *Cf.* H. PACKER, [*Hearings and Appeals on Social Security Matters: A Practical Approach*]. NATIONAL LEGAL AID & DEFENDER ASSOCIATION, 1966 SUMMARY OF CONFERENCE PROCEEDINGS 157.

yers. The Administration's corps of Claims Representatives and other personnel are trained and directed to render whatever assistance the Administration determines to be needed. For the middle-class claimant with a routine claim their services are unquestionably adequate to assure full enjoyment of his rights under the law. Moreover, to allow for the exceptional case and the exceptional claimant, and perhaps to placate the legal profession, the Social Security Act does permit lawyers to represent claimants and to receive for their services unprofessionally modest allowances from the recoveries of their successful clients.[65] The highly restrictive and all-encompassing limitations on fee arrangements have a very direct and profound effect on the availability and quality of legal representation.[66]

The consequences of the bureaucratic orientation of the social security program run in two directions. First, the poor claimant or potential claimant may be effectively denied his full rights of administrative consideration and judicial review of the denial of his claim, assuming that he has been sufficiently aware of his rights under social security to make application for benefits at the earliest possibility of his entitlement. While the weaknesses and disadvantages of the poor claimant discussed above imply that at least some handicapped individuals will give up before they have exhausted their procedural remedies, the limitations inherent in the assistance which the Administration itself can render, (discussed in detail in the succeeding sections of this article)[67] indicate additional sources of the deprivation of the rights of the poor man. Although inadequacies in the claimant's justifications for his entitlement as a beneficiary at the lower stages of administrative decision may be cured by the assistance of legal or other counsel at the hearing or court review stage, it cannot be assumed that all "deserving" claimants obtain competent assistance to vindicate their rights. The numbers of claims denials that are reversed by Hearing Examiners and courts—sixty-four percent and thirty-two percent, respectively, for disability claims in fiscal year 1966-67—suggest that the rights of hearing and review are not hollow formalities.

The second line of consequences of the bureaucratic orientation of the social security program is signaled by these figures of appeal and reversal. Why, if the Administration is so solicitous of its consumers' rights, are there as many hearings and court actions and, more importantly, so many reversals favorable to claimants? Why has there been such an increase in cases in recent years and such a disproportionate

[65] *See infra* § III. C. 1. Limitation of Attorneys' Fees of this article.

[66] *See supra* n. 2.

[67] *See infra* III. A. 1. Initial Application and Reconsideration, and 2. Administrative Hearing and Review.

number of disability cases prosecuted by relatively poor claimants? The phenomena are not adequately explained by easy assertions that the decision-makers either in the Administration, among the Hearing Examiners, or in the judicial system are inexperienced; that reversals are gained through technical loopholes facilitating results contrary to the purpose and intent of the program; that administrative decision-making violates fundamental due process and other constitutional rights; or that undue sympathy is extended to poor persons manifestly destitute and doubly deserving for the social security taxes they have paid. While all of these factors may exist to limited degrees and in isolated instances, they obscure the underlying reasons.

There are of course a certain number of court proceedings and prior administrative hearings in social security cases that resolve legal issues typical to all review of administrative action: whether the agency has abused its discretion in adopting regulations for conducting its program or following the regulations adopted;[68] whether its factual determinations meet the prescribed standards of evidentiary support (here substantial evidence);[69] and whether it has correctly construed and applied the substantive law governing its decision-making.[70] In social security claims adjudication the last issue is especially significant insofar as the family relationships which entitle dependents to benefits are determined for the most part according to the state law of the insured person's domicile. Judicial consideration of state domestic relations law determinative of a social security claim brought before the court for review does not differ from other applications of state law by federal courts.[71] In the course of the expansion of the social security program to include more and more dependents, the precedent value of many court decisions either upholding or reversing administrative determina-

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[68] Excepting disability cases as a sui generis class, the Administration has rarely been overruled for exceeding its power in adopting regulations, *see, e.g.*, Martlew v. Celebrezze, 320 F.2d 887 (5th Cir. 1963); *but cf.* Hobby v. Hodges, 215 F.2d 754 (10th Cir. 1954), or for abusing its discretion in applying regulations. *See, e.g.*, Cappadora v. Celebrezze, 356 F.2d 1 (2d Cir. 1966); Langford v. Flemming, 276 F.2d 215 (5th Cir. 1960). *But cf.* Moreno v. Celebrezze, 1A UNEMP. INS. REP. ¶ 14,766 (W.D. Tex. Mar. 30, 1967).

[69] *See, e.g.*, Flemming v. Huyke, 284 F.2d 546 (9th Cir. 1960); Blume v. Gardner, 262 F. Supp. 405 (W.D. Mich. 1966); Morris v. Celebrezze, 256 F. Supp. 506 (E.D.N.Y. 1966); Ford v. Ribicoff, 190 F. Supp. 822 (E.D. Tenn. 1961).

[70] *See, e.g.*, Foster v. Celebrezze, 313 F.2d 604 (8th Cir. 1963); Conley v. Ribicoff, 294 F.2d 190 (9th Cir. 1961); Henderson v. Flemming, 283 F.2d 882 (5th Cir. 1960); Flemming v. Lindgren, 275 F.2d 596 (9th Cir. 1960).

[71] *See, e.g.*, Rocker v. Celebrezze, 358 F.2d 119 (2d Cir. 1966).

tions has been obviated by Congressional amendment.[72] In addition, a number of court rulings adverse to claimants have been expressly acquiesced in by the Social Security Administration.[73]

The overwhelming preponderance of disability causes among cases appealed for hearing and court review requires a different explanation. Prior to the enactment of the 1967 Social Security Amendments, the definition of disability entitling an insured worker to benefits read simply "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment expected to last twelve months or longer or to result in death."[74] The Administration has preferred to apply the definition "literally," that is, restrictively, to provide benefits only upon the claimant's proving to the Administration's satisfaction that he cannot do any kind of work which exists in the United States because of, and solely because of, impairments established by clinical tests of loss of function of body and mind, plus consideration of his age, education, and prior work experience.[76] Regulations have been promulgated to specify the kinds of impairments that are *ipso facto* disabling, partially disabling, and not disabling, and the standards for establishing them.[77] It has also made clear that it is the function of the decision-maker, and not of a physician or anyone else, to determine whether a claimant is disabled because of his impairments.[78] Federal courts, led by the Fourth, Fifth and Sixth Circuits but followed by most other Circuits, have preferred to apply the definition "liberally" on the ground that, in the absence of clear intention of contrary Congressional intention, the Social Security Act should be liberally construed because it is remedial social legislation.[79] Through a number of decisions, they have evolved a body of law which, among other results, 1) shifts the burden of producing evidence from the claimant to the Administration,

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[72] *E.g.*, it seems clear that the plaintiff-claimants in the following cases could easily obtain benefits under the 1965 amendment to § 216(h) of the Social Security Act, 79 Stat. 286, § 339(a), enlarging the eligibility of illegitimate children to benefits. Cruz v. Gardner, 375 F.2d 453 (7th Cir. 1967).

[73] *See, e.g.*, Dolan v. Celebrezze, 250 F. Supp. 932, S.S.R. 67-9c (E.D.N.Y. 1966).

[74] Social Security Act § 223(c)(2)(A) (superceded). The separate definition of disabling blindness, Social Security Act § 216(i)(1), *as amended*, 81 Stat. § 104(d)(2) (13 U.S.C. CONG. & AD. NEWS 4586, Jan. 20, 1968), is not here relevant.

[76] *Cf* 20 C.F.R. § 404.1502 (1967).

[77] 20 C.F.R. §§ 404.1501–404.1539 (1967) (Ch. III, Part 404, Subpart P—Rights and Benefits Based on Disability).

[78] 20 C.F.R. §§ 404.1520, 404.1525, 404.1526 (1967).

[79] *See, e.g*, Davidson v. Gardner, 370 F.2d 803, 807-08 (6th Cir. 1966) and cases cited therein; Brooks v. Gardner, 1A UNEMP. INS. REP. ¶ 14,917 at 2499-80 (W.D. Va. Nov. 16, 1967).

i.e., upon the former's showing his inability to do his prior job, the Administration must demonstrate that there is some gainful activity in which the claimant can engage;[80] 2) allows proof of disability to include "personality disorders" less severe than the Administration's "severe psychoneuroses or psychoses," pain and suffering (connected with clinically-determinable ailments), lack of motivation, and demonstration that clinical tests do not adequately reveal the extent of the claimant's physical inability to do work;[81] 3) requires consideration of *all* evidence indicating disability of an individual claimant instead of the mechanical addition of separate symptoms, malfunctions, and conditions of an abstract man;[82] and 4) requires the Administration, in upholding its end of the evidentiary burden, to show availability of work within the claimant's capacity by specific reference to job positions located in the claimant's home area which, if they should be available, he would have some opportunity of obtaining.[83] One court has expressed succinctly the overriding criterion of its decision in a disability case:

> The standard which emerges from these decisions in our circuit and elsewhere is a practical one: whether there is a reasonable firm basis for thinking that this particular claimant [who has shown inability to perform his usual vocation] can obtain a job within a reasonably circumscribed labor market.[84]

Although the Administration has refused to acquiesce in these decisions[85] or to follow the rules and abide by the criteria established by them, many Hearing Examiners, exercising their independence from the Administration as Civil Service Commission appointees under the Administrative Procedures Act, have done so. The resulting situation has found claims denied at the lower levels of administrative adjudication but allowed in increasing numbers at the hearing examiner level, with

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[80] *See, e.g.*, May v. Gardner, 362 F.2d 616 (6th Cir. 1966).

[81] *See, e.g.*, Carico v. Gardner, 377 F.2d 259 (4th Cir. 1967).

[82] *See, e.g.*, Heslep v. Celebrezze, 356 F.2d 891 (4th Cir. 1966).

[83] *See, e.g.*, Boyd v. Gardner, 377 F.2d 718 (4th Cir. 1967).

[84] 1967 HOUSE REPORT 29.

[85] The only disability decision favorable to a claimant in which the Administration seems to have acquiesced by ruling is Kerner v. Flemming, 283 F.2d 916 (2d Cir. 1960), S.S.R. 63-11c, 1963 CUM. BULL. 94, the leading case shifting to the Administration the burden of furnishing "information as to the employment opportunities . . . , or lack of them, for persons of plaintiff's skills and limitations." On review of the remanded administrative proceeding in which such information was produced, the denial of Kerner's claim was upheld. Kerner v. Celebrezze, 340 F.2d 736 (2d Cir. 1965). The Administration has acquiesced in court decisions affirming its denials of disability claims, *see, e.g.*, Mark v. Celebrezze, 348 F.2d 289, S.S.R. 66-13c (9th Cir. 1965), and has expressly declined to acquiesce in cases reversing its determinations, *see, e.g.*, Hodgson v. Celebrezze, 357 F.2d 750, S.S.R. 67-14c (3d Cir. 1966).

courts receiving a decreasing number of cases for review. The techniques used by courts in reversing decisions on grounds of improperly restrictive application of the Act's definition of disability are discussed later.[86]

The 1967 Amendments to the Social Security Act, however, have changed the definition of disability. For all claims filed in or after, or pending final decision in, or appealed for court review in or after, January 1968, the determination of disability must satisfy the following provisions:

> [A]n individual . . . shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work expeirence, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions in the country.
>
> [A] "physical or mental impairment" is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques.
>
> An individual shall not be considered to be under a disability unless he furnishes such medical and other evidence of the existence thereof as the Secretary may require.[87]

The commentaries on the foregoing provision in the Congressional committee reports accompanying the Amendments will show clearly that its enactment was a victory for the Administration against the courts in their differences over the practical definition of "disability." The report of the Ways and Means Committee, where the bill originated, states frankly that the chief reason for the elaborated definition is the failure of Administration's experience to bear out the prior actuarial predictions of the numbers of future disability claims. The portion of the tax contributions for, and the actuarial balance of, disability insurance have

[86] *See* test at n. 227-39 *infra*.

[87] 81 Stat. 821, § 158(b) (13 U.S.C. Cong. & Ad. News 4630, Jan. 20, 1968), *amending* Social Security Act § 223.

been set on the basis of these predictions.[88] Because allowed claims and benefits exceeded estimate costs, the actuarial balance of the program was negative in both 1965 and 1967, requiring Congress to approve increased allocations of social security tax contributions for the payment of disability benefits.

The Committee was led from these events to the decision to restrict the breadth of disability entitlement by the following logic:

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[88] 1967 HOUSE REPORT 28-31. The Presidential Administration bill for the Social Security Amendments of 1967, H.R. 5710, introduced Feb. 20, 1967, did not change the existing definition of disability but did provide Medicare benefits to disabled wage-earners on the same basis as to the aged. Section 125. The bill was replaced, however, by H.R. 12080, introduced on Aug. 3 by Representative Mills, Chairman of the House Ways and Means Committee, which introduced the redefinition of disability. Section 156. The bill was approved by the House without amendment on Aug. 17 and sent to the Senate, where it was referred to the Committee on Finance. The Committee accepted both the redefinition and the rationale for it as prepared by the House Ways and Means Committee. S. REP. No. 744, 90th Cong., 1st Sess. 46-50 (1967). The existing definition was restored, however, by amendment on the Senate floor during debate on H.R. 12080. The amendment was introduced by Senator Metcalf, who drew special attention to the fact that while eight witnesses and correspondents had objected to the restriction imposed by the redefinition, including Mr. George Meany, President, AFL-CIO, only one had approved it, Mr. Paul P. Henkel, chairman of the Social Security Committee of the Council of State Chambers of Commerce. See *Hearings Before the Sen. Finance Comm., Social Security Amendments of 1967.* 90th Cong., 1st Sess., Part 2, at 1076-77, 1267, 1434-35, Part 3, at 1935, Appendix at 22, 109, 160, 168, 242 (1967). Senator Metcalf also discussed the Committee reports explaining the reasons for the change in the disability definition, referring specifically to their sole identified case reference from among the court decisions condemned, Leftwich v. Gardner, 377 F.2d 287 (4th Cir. 1967), in which the Court of Appeals reversed a denial of disability benefits because the claimant was working, though disabled, to support his family, and to the Administration's explanation of the reasons for the unanticipated number of disability claims. *See infra* text at n. 90. "Actually, what has happened is that the social security system and the Department of Health, Education, and Welfare have lost a lawsuit. The courts have defined disability using the definitions out of the Veterans' Act, out of the Workmen's Compensation Act, and held against the present definition we have in the present bill." 113 CONG. REC. 16,742 (daily ed. Nov. 17, 1967) (remarks of Senator Metcalf). The amendment carried by a vote of 34 to 20. *Id.* at 16,746. The Senate adopted the Amendments bill as amended on Nov. 22. However, in deliberations of the Conference Committee appointed to reconcile the House and Senate versions of the Amendments bill, the Senate withdrew its floor change and the Committees' redefinition was reinstated, with a minor "clarification" of "work which exists in the national economy." *See infra* n. 92. The Senate's companion removal of the special limitation on entitlement of widows and widowers to disability benefits, inability to engage in *any* substantial gainful activity, *see supra* n. 57, was also withdrawn. CONF. REP. No. 1030, 90th Cong., 1st Sess. § 109, 13 U.S.C. CONG. & AD. NEWS 5501, 5519, Jan. 20, 1968 (Dec. 11, 1967). The Conference report was accepted by the House on Dec. 13 and by the Senate, after considerable debate, on Dec. 15.

> Over the last four years the number of disability allowances was larger than the number estimated. Because there is no evidence to indicate that the proportion of the disabled in the country is greater now than 4 years ago, the committee is forced to conclude that over a period of years a number of subtle changes may have occurred in the concept of the "disabled worker."[89]

The rest of the commentary on the redefinition analyzes first the "subtle changes" worked by the courts and then the provisions of the amendment, designed "as a remedy for the situation that has developed . . . [by] provid[ing] guidelines to reemphasize the predominant importance of medical factors in the disability determination." The following circumstances which "in large part [are] the reasons why a larger number of people than anticipated have become entitled to disability benefits are merely recited by the Committee without elaboration:

> (1) Greater knowledge of the . . . program to increased numbers of qualified people . . .;
>
> (2) Improved methods of developing evidence of disability; and
>
> (3) More effective ways of assessing the total impact of an individual's impairment on his ability to work.[90]

What the Committee may have been "forced to conclude" about the relationships between the Administration's erroneous estimates, the list of reasons for the errors, and the court decisions expanding the disability definition is left to conjecture.

The Committee on Ways and Means at no point indicates that it wished to analyze the reasons behind or merits of the courts' liberalization of the disability definition beyond the Administration's preference for a restricted meaning. In fact, it betrays a considerable lack of understanding of the factual circumstances of disability claimants' benefitting from judicial reversal of adverse administrative determination when it states:

> It is, and has been, the intent of the statute to provide a definition of disability which can be applied with uniformity throughout the Nation, without regard to where a particular individual may reside, to local hiring practices of employer preferences, or to the state of the local or national economy.[91]

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[89] 1967 HOUSE REPORT 28.

[90] *Id.* at 28-29. In fiscal year 1965-66 the Administration received 530,294 claims for disability benefits against an estimated figure of 600,800 claims on which its budget request was based. In 1966-67 the respective figures were 556,706 and 550,900.

[91] *Id.* at 30.

What is "uniformity throughout the nation" for a disability program? Does the phrase mean that an individual who committed the error twenty or thirty or more years ago of going to work in an industry marked by dangerous work, declining markets and technological obsolescence must now suffer poverty because as a result of his years of work, he is now effectively deprived of his work capacity and economic, social, and geographical mobility—but could get work if he happened to live elsewhere in the country, in a different community, environment, and culture? Experiences of examiners in the coal fields of Appalachia show that the causes, cures, and effects of disability impairments are, at least among the poor, inseparably connected with such particularities of the areas as the health of its economy and the hiring practices of its employers. Moreover, the Committee's statement is scarcely consistent with the policy, now written into the language of the Act, of considering the claimant's "age, education, and work experience." As a practical matter, difficulty exists in separating these personal factors from economic and social conditions.

In fact, experience under the new disability definition may prove that the foregoing discussion of it is unduely alarmist and ultimately ironic. Placed in the existential context of the concrete factual situations in which Hearing Examiners and federal judges must decide controverted disability claims, the language of the Congressional directions is anything but definitive. It can be convincingly argued, for example, that a "physical or mental impairment" that "results" from a clinically demonstrable abnormality includes pain and other effects stimulated by, or otherwise related to, the abnormality and that nothing in the new definition prohibits continuing the court-made rule shifting the burden of producing evidence from the claimant to the Administration. The added language concerning the availability of work in which a claimant unable to do his previous work can engage in is perhaps so imprecise in its distinguishing use of the terms "national economy," "immediate area," "region where such individual lives," and "several regions of the country" that it can provide little guidance in many cases.[92] Even the most restrictive words in the redefinition, which remove from the decision-maker's consideration "whether the claimant would be hired if he applied for work," lack contextual clarity. A line cannot always be drawn between (1) non-hireability for reasons of disabling incapacity that totally precludes the claimant from doing any assigned work in a job and (2) non-hireability because of partial incapacity that permits some gainful work but limits desirable or necessary versatility in the

[92] *See supra* text at n. 87; *cf.* Wimmer v. Celebrezze, 355 F.2d 289 (4th Cir. 1966).

job and also risk loss of work time in the future because of increasing disability.[93]

The moral of the 1967 amendment to the disability definition, and of whatever interpretation the Administration, the Hearing Examiners, and the courts may afford it, is apparent: that the bureaucratic ideals governing the Social Security Administration may not, in the quest for certainty and predictability, do the poor man service equal to the middle-class man. Precisely because it seeks to abstract "disability" from the circumstances in which it exists, it will deprive the poor man, the causes of whose poverty from unemployment do not fit neatly into categories of aid.

In times when the services of lawyers and courts are increasingly regarded as archaic, expensive, dilatory and inefficient ways for conflicts and claims resolution, it is not immaterial to notice that the philosophy of the courts' decision-making in disability cases is precisely what the war on poverty has ordered: a comprehensive assault on the causes of poverty and a thorough redress of the rights of the poor. The legal approach is profoundly existential: does *this* claimant, incapacited from doing *his* prior work, have a reasonable chance, under all of the relevant circumstances of *his* situation, of obtaining and retaining gainful employment? While in taking this position the courts may exceed the limits of the disability program envisaged by Congress, their policy deserves consideration. On the one hand they are implicitly recognizing the work value (and the family responsibility value) in the administration of a social welfare program; on the other hand they are overcoming the programmatic boundaries and inadequacies that frustrate and deny the poor. Although it is true that some disability beneficiaries could or should be rehabilitated, by agencies established for that purpose, the facilities and capabilities of the agencies are often inadequate for the task;[94] while some disability claimants could obtain light but remunerative work if they resided elsewhere in the nation, they do not reside elsewhere, it is unreasonable to expect that they will move elsewhere, and there are few facilities for expediting their re-

[93] E.g., it is a practice in disability claims hearings before Hearing Examiners to establish the work that the claimant can do, after he has proved he cannot engage in his prior occupation, by posing hypothetical questions to an impartial witness expert in vocational placement. The Examiner may ask: assuming that a man 45 years old who has a fourth grade education and no transferable work experience cannot because of medical impairment, *e.g.*, a heart condition, lift weights exceeding 25 pounds or otherwise engage in heavy work, in what gainful employment can he engage? The expert may respond that the claimant can work as a service station attendant, as a wrapping machine operator in a bakery or as a capper in a bottling plant. *Cf.* Kirby v. Gardner, 369 F.2d 302 (10th Cir. 1966).

[94] *Cf., e.g.*, Cooke v. Celebrezze, 365 F.2d 425, 427 (4th Cir. 1966).

location;[95] although some disability beneficiaries could do some work if they would overcome the neuroses or their lack of motivation, in fact the problems of their minds and emotions are not of their deliberate manufacture, control, or removal;[96] and while some disability claimants should look to unemployment compensation for assistance, it is also true that unemployment compensation is seldom available to the long-term unemployed, especially the long-time unemployed who are the least desirable employees.[97] This list of factors and its endless continuation deserves the consideration of any Congress undertaking to redefine the meaning of disability.

While the 1967 amendment elaboration of the disability definition may achieve some measure of satisfaction for the Social Security Administration, for the courts it provides cause for a new round of case-by-case statutory construction and interpretation. Until decisions are rendered and opinions are written the status of many disability claims will be in limbo, especially if the Administration embarks upon a hard line of limiting disability allowances to severe cases. The need for legal or other counsel will increase simply to bring denied claims before decision-makers for independent applications of the new definition. If, as it may be reasonable to predict, the courts succeed in minimizing the practical effects of the 1967 definition,[98] it is not unlikely that the Administration will again appeal to Congress for further elaboration of the disability definition. In the absence of sociologists and lobbyists in the hire of potential disability claimants the task will fall to lawyers who have partcipated in social security decision-making to bring before Congress a full explanation, as persuasively presented as the Administration's, of the policy behind their construction of the disability provision.[98(a)]

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[95] *Cf., e.g.*, Fields v. Gardner, 378 F.2d 4, 5 (4th Cir. 1967).

[96] *Cf., e.g.*, Beggs v. Celebrezze, 356 F.2d 234, 235-36 (4th Cir. 1966).

[97] *Cf., e.g.*, Abshire v. Gardner, 271 F. Supp. 927, 932 (S.D.W. Va. 1967).

[98] Three cases decided under the 1967 amendment suggest that there has been no substantial change in the standards of medical determination of impairment. In Whitt v. Gardner, 1A UNEMP. INS. REP. ¶ 14,937 (6th Cir. Feb. 17, 1968), and Prewitt v. Gardner, 1A UNEMP. INS. REP. ¶ 14,935 (5th Cir. Feb. 8, 1968), the court remanded the case for further proceedings because the Hearing Examiner had adhered to the standard of *objective* medical evidence in making his determination. The opinion in the third case, remanded for failure to determine the vocational capacities of the claimant, does not question materiality of evidence of "severe nervousness." Daniel v. Gardner, 1A UNEMP. INS. REP. ¶ 14,934 (5th Cir. Feb. 8, 1968). All three opinions state or imply, however, that the standard of work availability has been changed.

[98a] Perhaps with encouragement from the Administration: "Your committee instructs the Social Security Administration to report immediately to Congress on future trends of judicial interpretation. . . ." 1967 HOUSE REPORT 30.

The legal profession continues to be less than adequately prepared to represent disability or other social security claimants. Both the Administration's thinly-disguised measures to inhibit lawyers from taking social security cases and the profession's traditional bias for the legal problems of wealth and business, as reflected, for example, in law school curriculums,[99] are among the causes of the bar's disinterest and inexperience in social security practice. The only private specialists in social security law are plaintiff's lawyers, perhaps especially workmen's compensation practitioners, necessarily located in areas where the volume of disability claims is relatively large, who have taken on social security representation perhaps for charity, for needed clientele or for some other coincidental circumstance. Because a fee, however adequate or inadequate, can be generated on a contingent basis, the availability of legal aid and legal services assistance to an impoverished claimant at any but the earliest stages of the claims process is doubted.[100]

Not only are many lawyers uninformed of the peculiarties of social security practice, which are not difficult to master, but lawyers' literature has been singularly lacking in helpful clarifications and explanations. Therefore the remainder of this article is devoted to a description of procedure in the successive stages of social security claims adjudication and review.

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[99] *See* Viles, *op. cit. supra* n. 45, at 139.

[100] "One type of civil case that is always excluded [from eligibility for legal aid], even if the applicant is destitute, is the one a private lawyer could take on a contingent fee basis. This includes not only the usual personal injury cases, but also workmen's compensation, claims for unpaid debts, and possibly some claims for social security benefits. . . ." L. SILVERSTEIN, FINAL REPORT: ELIGIBILITY FOR FREE LEGAL SERVICES 5 (AM. B. FOUNDATION, Aug. 1966). *Cf.* AMERICAN B. CENTER, LEGAL AID HANDBOOK 6-7 (1966); NATIONAL LEGAL AID and DEFENDER ASSOCIATION, *Hearings and Appeals on Social Security Matters: A Practical Approach*, 1966 SUMMARY OF CONFERENCE PROCEEDINGS 157-62. "Programs should not provide free legal advice in fee-generating cases, such as contingent fee cases or other cases in which a fee provided by statute or administrative rule is sufficient to retain an attorney. The test should be whether the client can obtain representation. When a case generates a fee sufficient to employ competent private counsel, the client should be referred under an appropriate lawyer referral system. If the fee is not sufficient to attract a private lawyer, the client may be eligible for the assistance of the OEO-funded program." OFFICE OF ECONOMIC OPPORTUNITY, GUIDELINES FOR LEGAL SERVICES PROGRAMS 20-21 [undated].

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[99] See Vilos, op. cit. supra n. 45, at 139.

[100] "One type of civil case that is always excluded [from eligibility for legal aid], even if the applicant is destitute, is the one a private lawyer could take on a contingent fee basis. This includes not only the usual personal injury cases, but also workmen's compensation claims for unpaid debts, and possibly some claims for social security benefits. . . ." L. SILVERSTEIN, FINAL REPORT: ELIGIBILITY FOR FREE LEGAL SERVICES 5 (AM. B. FOUNDATION, Aug. 1966). Cf. AMERICAN B. CENTER, LEGAL AID HANDBOOK 6-7 (1966); NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, Hearing and Appeals on Social Security Matters: A Practical Approach, 1966 SUMMARY OF CONFERENCE PROCEEDINGS 127-62. "Programs should not provide free legal advice in fee-generating cases, such as contingent fee cases or other cases in which a fee provided by statute or administrative rule is sufficient to retain an attorney. The test should be whether the client can obtain representation. When a case generates a fee sufficient to employ competent private counsel, the client should be referred under an appropriate lawyer referral system. If the fee is not sufficient to attract a private lawyer, the client may be eligible for the assistance of the OEO-funded program." OFFICE OF ECONOMIC OPPORTUNITY, GUIDELINES FOR LEGAL SERVICES PROGRAMS 20-21 [undated].

POPULATION AND POVERTY[1]

In recent decades concentration of people in metropolitan areas has increased while rural settlement has become more sparse. Many towns and communities in rural areas that once thrived on servicing a farm population have become socially and economically obsolete. On the other hand, the displaced rural people who migrated to central cities, particularly colored people, have added immensely to the problems of these cities. This rural-urban population inbalance is closely associated with the income distribution or poverty problems of both rural and urban areas.

This article combines two papers that:

(1) Provide a framework for evaluating present conditions and suggest a program direction that might provide a solution.

(2) Analyze the effect of present programs on population outmigration and Mississippi's resultant economic and social environment.

Hopefully, the papers together will assist people interested in Mississippi's future to better evaluate present and future policies and programs for social and economic development.

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[1] The information contained in this article was accumulated by the authors in response to a research assignment commissioned by the Legal Institute of Agriculture and Resource Development. It is used with the approval of this organization. The opinions based on this information are those of the authors.

THE ECONOMIC EFFECT OF POPULATION IMBALANCE

*L. V. Watkins, Jr.**

The United States is rapidly coming face to face with a dilemma as its social and economic order evolves. On the one hand are the overgrown and evercongested cities characterized by narrow streets, slums, and ill-sorted industries. There abound extravagant wastes in time, energy, and money in the transportation of people and goods over excessive distances, without any compensating social or natural environmental assets. The rural areas, on the other hand, long since emptied of much of their more able and enterprising personnel, are characterized by poverty, social desolation, inadequate companionship, and lack of cooperative effort. Mechanized agriculture cannot hold the population nor provide the means for those who remain. Unlike the cities the rural areas have an abundance of open space, fresh air, and other gifts of nature.

Conscious policy makers and educators have long thought these rural and urban phenomena to be closely associated. The major task has been one of identifying a problem buried deep in a mass of symptoms. With the cities in a present state of crisis and rural areas approaching sheer abandonment, new effort is being directed at isolating the problem and engineering its solution.

The object of this paper is to present the problem as identified by Alfred Marshall more than seventy years ago, briefly analyze its economic implications, and recommend a means of finding its solution. It is hoped that it will assist in focusing attention on its subject matter, a problem of extreme importance at this stage of social and economic development.

In his book, PRINCIPLES OF ECONOMICS, published in 1890, Alfred Marshall identified the problem with the following statement:

> Wakefield and the American economists have taught us how a sparsely inhabited district is enriched by the advent of every new settler. The converse truth, a closely peopled district is impoverished by everyone who adds a new building or raises an old one higher.[1]

Stated in other terms, poverty conditions intensify as population increases in congested areas and as the population decreases in sparsely settled areas.

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[1] Alfred MARSHALL, 6 PRINCIPLES OF ECONOMICS 547, (1st Ed. 1890).

Economic Explanation

The economic explanation of the problem is found in the complex and often misunderstood economies (increasing relative values) and diseconomies (decreasing relative values) of the physical law of variable proportions or decreasing returns.[2] The law of decreasing returns is stated in two general ways.

1. As the quantity of one resource is increased while the other resources are held constant, total output will increase, but beyond a point resulting output increases will become smaller.

2. As the quantity of any one resource is combined with a fixed quantity of other resources, the marginal physical productivity of the variable resource must eventually decline.

The first statement expresses the law in terms of total productivity while the latter expresses it in terms of marginal physical productivity. Both are stated under the condition of fixed technology.

The operation of the physical law of diminishing returns in relation to the production function is shown in Figure 1.

This figure assumes a single (or composite) fixed factor and a single (or composite) homogeneous input used in varying amounts. It shows the relationship between the variable input x_1 and total physical product [TPP_{x_1}], marginal physical product [MPP_{x_1}], and average physical product [APP_{x_1}].[3] At the maximum point on TPP_{x_1} touches the horizontal axis and is zero. Beyond this point, MPP_{x_1} is negative and total

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[2] A. Marshall, 6 Principles of Economics 125-129 (1890); R. Leftwich, The Price System and Resource Allocation Ch. 8 (1961); K. Boulding, 1 Economic Analysis 426 (1966).

Assumptions underlying this law deal with the period of time relative to input-output flows. The period of time must be:

a) sufficiently short to prevent alteration of fixed inputs;

b) sufficiently short to prevent technological improvements from altering the shape of the production function;

c) sufficiently long to enable completion of the necessary technical process.

In real world municipal districts, similar effects are brought about when population increases faster than land area and technological improvements relative to scale problems.

[3] Average physical product is that ratio of the total product to the quantity of inputs used in producing that quantity of product, or, simply, the total product divided by the inputs.

Marginal physical product is the addition to total product resulting from the addition of one unit of input or simply the change in total product divided by the change in inputs.

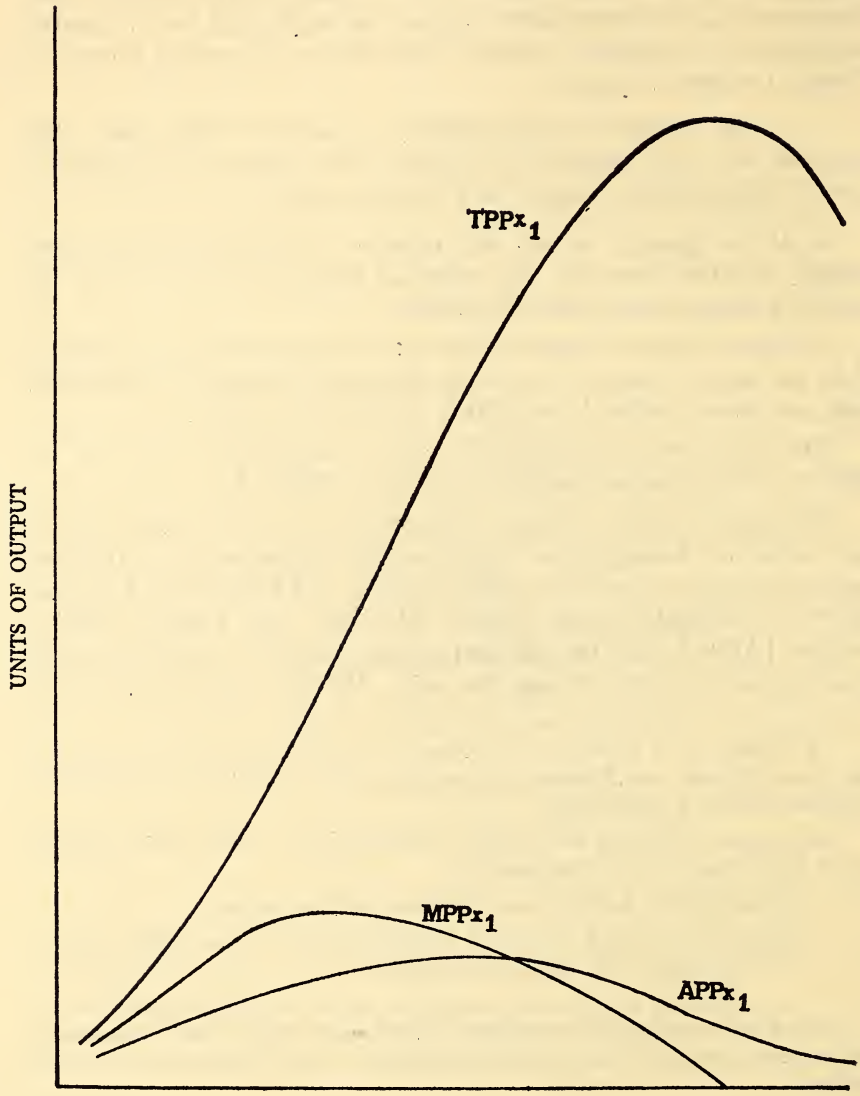

FIGURE I. THE LAW OF DIMINISHING RETURNS

product declines. When $MPPx_1$ is above $APPx_1$, average physical product is increasing. When $APPx_1$ is equal to $MPPx_1$, average physical product is at a maximum. When $MPPx_1$ is below $Appx_1$, average physical product is decreasing.

Thus far the discussion has been related to the physical law of diminishing returns. Our economic society, however, is interested in knowing the input-output problems in value terms. The change from the physical to the economic concept of diminishing returns can be accomplished simply by assigning a cost to each of the input factors and a market value or price to each unit produced. The total function becomes total value product (TVP), with its corresponding functions of marginal value product (MVP) and average value product (AVP). The demand for variable resource inputs is represented by the MVP curve. The optimum rate of production and resource use depends on the relationship of product prices to factor prices and the objective of the production unit under consideration. Given the objective, resources will be allocated to the point where the marginal value product of output is equal to the cost of the resources.

Economist have long considered the law of diminishing returns relevant to economic studies of business firms and of national governments. Marshall, however, appears to be one of the few to apply it to the aggregate production on a district or municipal basis.

When these district or municipal units are considered, several questions come to mind. Do such units really respond in accordance with the law of diminishing returns? What is the economic objective of such units? Where is the optimum level of resource allocation for such units?

The first question was answered clearly by Marshall and is illustrated by figure II.[4] The increasing of population in a district would develop the organization of trade and industry, enable various economies of specialized skills and machinery, increase the facilities of communication of all kinds, and provide new opportunities for social comfort and luxuries of culture in every form, thus increasing the collective efficiency of a people in obtaining goods and services.

After a point, however, the collective services which land renders to man, in giving him space, light, and air in which to live and work must conform to the law of diminishing returns with the actual economic impact being determined by the effect of economics and diseconomies on the physical function.

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[4] A. Marshall, 4 Principles of Economics 138-140, 267, 268 (1890); 5 Principles of Economics 337 (1890).

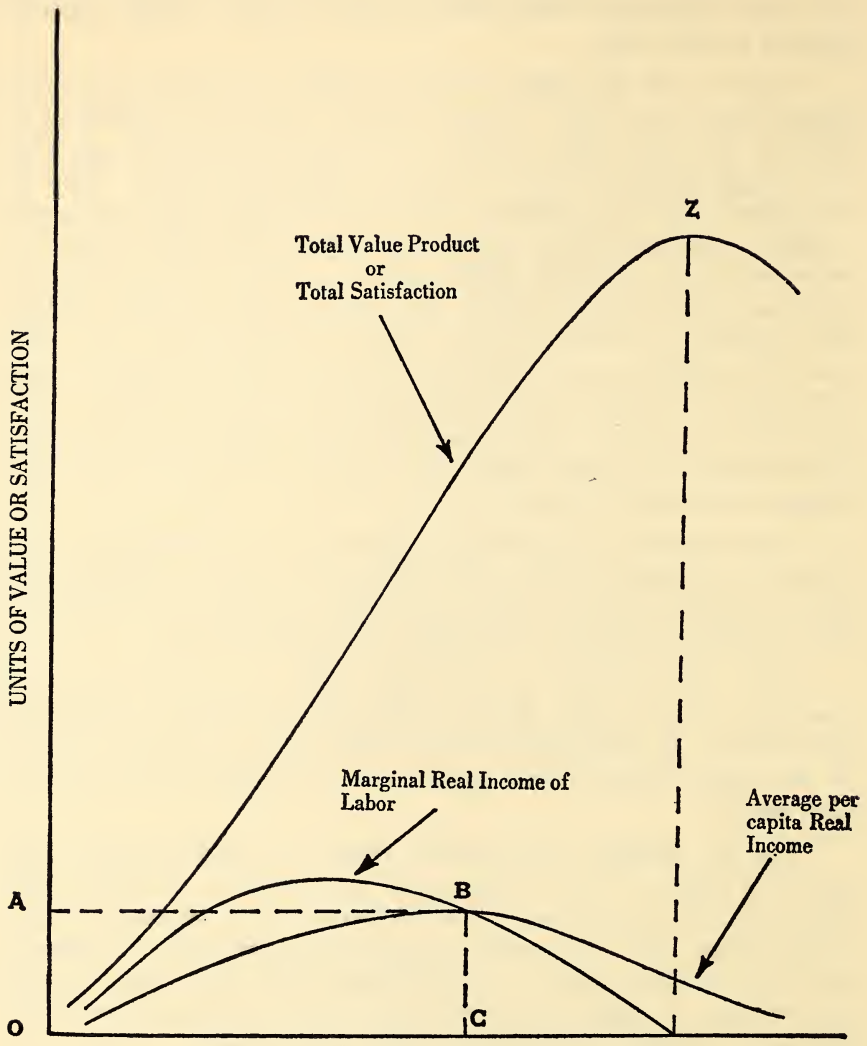

Figure II. The Law of Diminishing Returns
Stages of Production

Economies and diseconomies, in their broad sense, are reflected in both the product and factor prices. External economies include increasing export product prices and decreasing import factor prices. Internal economies result from increased specialization of labor and technological innovations. External diseconomies include decreasing export product prices and increasing import factor prices. Internal diseconomies include decreasing internal product prices and increasing factor costs, such as land prices.

It should be kept in mind that Marshall was speaking in terms of all goods and services that yield satisfaction or utility to man.[5] This includes space utility as well as non-space utility goods and services.

Space utility encompasses space for living, leisure, privacy, child play, and group activities; space that gives a sense of noncongestion, reduces traffic dangers, increases mobility (reduces friction), and reduces noises; space for visual aesthetics, clean air, sunlight, and psychological spaciousness. Non-space utility commodities encompass automobiles, clothing, education, city services, and so on.

Total satisfaction and total utility are synonymous with real income when the latter is defined as total pleasure yielded by a given monetary outlay plus those psychological, location, and environmental benefits yielded without monetary outlay.

The question of the proper economic objective for a district or municipality has received little attention in past years. The two objectives most often acknowledged have been (1) maximum aggregate profits for the firms of the district, and (2) maximum total satisfaction. These were often thought synonymous. The first has, in general, been rejected as firms concentrate and the local populace feels the limiting effects of inadequate public services and inequitable distribution of real income. The fallacies of the latter become obvious upon analysis. Marshall made it clear that total aggregate satisfaction or real income would eventually conform to the law of diminishing returns. The optimum is, therefore, theoretically possible as shown in Figure II. To achieve it, however, would require producing to point, Z in Figure II, where total real income would start to decline. Operation at the maximum value of total satisfaction (point Z) is not considered an economically feasible point in a capitalistic system unless labor is a free commodity. Therefore, such an objective in our system tends to be self-defeating.

Past experience has shed light on a desirable objective for districts or municipalities. Marshall indicated that as long as people were added to an area and the marginal value product of labor in terms of real

[5] A. Marshall, 3 Principles of Economics 78, 79 (1890).

wages is higher than the average value product in terms of real income, then the average per capita real income or satisfaction will increase. However, after a point, the marginal value of labor would fall below the average value product, and average per capita real income would decline. Therefore, in a system such as ours which is concerned with individual well-being, the optimum allocation of human resources over the given land space of a municipal district occurs when the average per capita real income is at a maximum. This is graphically shown at point B in Figure II. The optimum population density is at point *C* where the average per capita real income is *A*. It is easy to see that average per capita real income declines by both increasing and decreasing human resources. To add people past point *C* would press the marginal value product of labor toward subsistance wages and poverty. The subtraction of people would also reduce average per capita real income and would ultimately move the marginal value of labor toward subsistance wages and poverty.

Real world observations indicate that the geographic distribution of people in the United States is approaching the two extremes. The physical relationship has supporting economic phenomena in poverty, unemployment, and labor union activity to maintain real wage relationships in the cities, and unemployment, underemployment, and collective activity to maintain wage and income relationships in the rural areas.

To better appreciate the above relationship one must understand more clearly the economies of concentration on the various economic and social functions of a modern society and their effects on per capita real income. This may be illustrated briefly by restoring to a limited quantity of public and private services. Public services are the easiest to present. We have been told in recent years that some public services have a U-shaped average cost curve while others have continuously declining average cost curves.[6] For example, at first average per capita cost of police protection declines as population density increases but after a point it starts to increase. In other public services the average per capita cost continues to decline at all present known levels of population density. Nevertheless, a minimum average per capita aggregate cost for all public services can be found. The variety in functions makes it difficult to generalize on the private sector. It will suffice, nevertheless, simply to show the contrasting effects of concentration on housing and industry. The average per unit cost of housing increases

[6] Lillibridge, *Urban Size: An Assessment*, 28 LAND ECONOMICS 341-352 (1952); O. Duncan, *Optimum Size of Cities* in P. HATT and A. REISS, READER IN URBAN SOCIOLOGY 639-649 (1951); Shapers, *Economies of Scale and Local Government Finance*, 39 LAND ECONOMICS 175-186 (1963); Clark, *The Economic Function of a City in Relation to its Size*, 13 ECONOMETRICS 97-112 (1945).

with population density; however, the opposite is true of the per product unit cost for certain firms, especially those oriented to mass markets, communications, and labor.

Increased appreciation of the stated optimum may be acquired by analyzing the economic effects of private ownership in land. Marshall implied in numerous places that under such a system, land value would have a significant effect on the marginal value of real wages and the distribution of real income. To adequately understand his analysis we must get a clear view of land value. Professor Marshall considered land value to be the capitalized value of any net income which a plat of land affords, its capacities of development for any kind of business, and its other material, social, and aesthetic advantages.[7] In addition he felt land value had three basic elements:[8] (1) the value of the soil as made by nature, (2) the additional value of improvements made to it by man, and (3) the additional value contributed by the growth of a dense or rich population, facilities of communication, and public roads, railroads, etc. The first two elements, traceable to work or outlay by the individual owner, may be called private value, the third element may be called public value.[9]

The public value of land increases with the addition of every new person to an area, but this increase in the value of land does not contribute significantly to the redistribution of real income until the optimum level of average per capita real income is achieved. Past this point, the marginal value of labor in terms of real wages is declining while the marginal value product of land in real value terms is increasing. The result is a substantial increase in the proportion of real income accruing to the landowner at the expense of the laborer. It is significant to note that the redistribution of this income through tax and transfer as suggested by some economists would not be sufficient to return average per capita real income to its optimum.

This may also be illustrated by the use of Figure III which reflects the marginal value product of people or marginal real income to people and the average value product or average real income to people in an aggregate production function when land space is fixed and population is the only variable input.

By increasing population from C to F, total income becomes (ODEF) with (OGHF) going to labor and (GDEH) to land. By redistributing to labor the economic rent that accrues to land (GDEH) the average per capita income is increased to D, which, however, is still below the optimum A.

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[7] A. Marshall, 5 Principles of Economics 369 (1890).
[8] A. Marshall, 4 Principles of Economics 130 (1890).
[9] A. Marshall, 5 Principles of Economics 360 (1890).

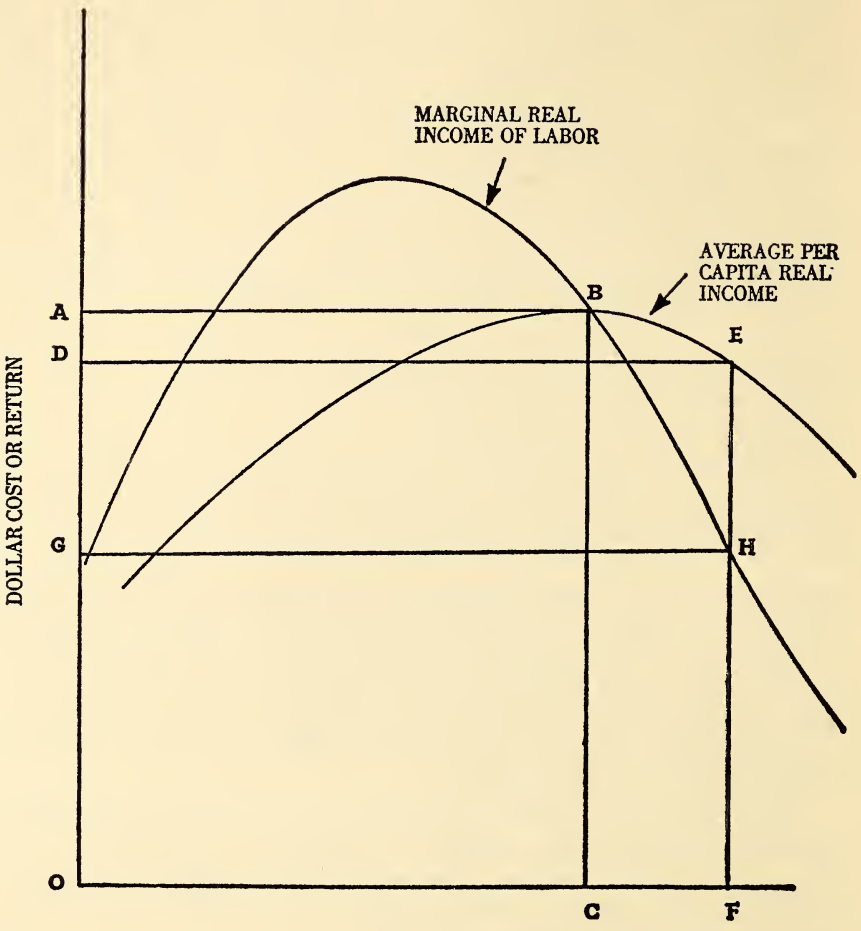
MARGINAL REAL
INCOME OF LABOR
AVERAGE PER
CAPITA REAL
INCOME
DOLLAR COST OR RETURN
A
D
G
O
B
E
H
C
F
UNITS OF POPULATION INPUT

FIGURE III

The important point that comes to mind after viewing both public and private services is that while the cost of each service effects real income, the aggregate average cost function is the most essential. In our analysis this function correlates inversely with the average per capita real income curve.

This analysis of the problem as identified by Alfred Marshall discloses several significant points relevant to the plight of both rural and urban America. For urban areas it reveals:

1. That the average per capita real income of an area can be substantially reduced by overpopulation. Per capita real income is thus reduced by increasing costs of land, increasing costs of public services, increasing cost of individual mobility, and increasing cost of public welfare programs.

2. That industrial firms may find it economical to move to congested areas even though their presence may result in a net decline in the per capita income of the areas' inhabitants; the drawing forces would be economies of mass skill labor markets and economies of transportation alternatives. This is further benefited by municipal inducement programs such as tax breaks, special rates on services, and plant site contributions or favorable leasing arrangements. Others face national or international markets which may offer substantial external economies in excess of local diseconomies.

3. That overpopulation of an area may result in an inequitable distribution of real income between landowners and labor. This is illustrated in Figure III.

In congested conditions, the addition of each new person makes land space for fresh air, light, play room, and other economic and social use more precious. As a result, each person is willing to pay the greater share of aggregate income going to the landowners.

For rural areas it reveals:

1. That the average per capita real income of an area may be substantially reduced by underpopulation. This is brought about by increasing cost or declining quality and quantity of public and private services, decreased employment opportunities, and increasing social and economic isolation.

2. That industrial firms may find it uneconomical to move to rural areas even though labor is cheap and their presence may result in a new increase in per capita real income of the areas' inhabitants. The repelling forces are the diseconomies caused by inadequate local mass markets, inadequate quantity and variety of skilled labor, inadequate alternative transportation and communication facilities and services, etc. Often, local inducement programs will not be adequate to overcome these diseconomies.

Recommended Solution

Alfred Marshall, in essence, viewed the problem economically as one of resource allocation and income distribution. This, however, just raises the question: How does a nation or state acquire the desirable distribution of resources and income?

This question becomes even more difficult to answer when viewed in light of a free democratic society. Yet a full understanding of the difficulty of this question is necessary before citizens and policy makers can proceed in solving the present population inbalance problem.

History has not been void of suggested solutions. Recommendations have evolved on two planes—one from the view of solving the city problem; the other from the view of solving the rural problem.

Alfred Marshall cautioned against mass expenditures on permanent improvements in the large cities to solve the problems of the poor. He indicated that the whole area of the cities were inadequate to supply the needs of the populace, thus permanent improvements would yield only a small portion of their returns to the poor with the majority of the returns accruing in the long run to landlords.[10]

Marshall made it quite clear that population dispersal was the solution to the problem of the cities and suggested means of doing it. In this regard, he stated:

> There is no better use for public and private money than in providing public parks and playgrounds in large cities, in contracting with railways to increase the number of the workmen's trains run by them, and in helping those of the working classes who are willing to leave the large towns to do so, and to take their industries with them.[11]

Marshall felt that a variety of methods could be employed to disperse population, but he specifically suggested that committees be set up to establish colonies in the rural areas of England, build or buy suitable housing, establish or relocate industry, and assist in the moving of people to the new area.[12]

In addition, he encouraged large cities to provide more physical space by developing public parks and playgrounds and better transportation connections with other areas of England. He suggested that a tax on the public value[13] of land would not only provide funds for these purposes, but it would also provide for a more equitable distribution of benefits and reduce speculation in land.[14]

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[10] A. Marshall, Final Report of the Royal Tax Commission 12 (1901).

[11] A. Marshall, Principles of Economics 200 (1948).

[12] A. Marshall, *The Housing of the London Poor*, Contemporary Rev. (1884).

[13] By "public value" is meant the additional value contributed by the growth of a dense or rich population, facilities of communication, and public roads, railroads, etc.

[14] A. Marshall, Principles of Economics 661-662 (Appendix G 1964).

Federal and state programs have been implemented for cities but most have been in conflict with the economics as put forth by Marshall. Programs have been enacted to provide parks and high density public housing, and in addition, programs have assisted the development of transportation facilities. However, programs to disperse population or industry have been avoided to the detriment of both city and rural citizens.

On the rural side programs suggested and implemented have been primarily resource adjustment and control programs. Their objective has been to provide adequate income from traditional rural and agricultural sources to stop the outmigration of people. Unfortunately, the effect of many of these programs has been to accelerate outmigration from rural areas. In recent years other approaches have evolved, including regional, area, and rural development programs, and they have likewise been geared to stop outmigration. In the light of the overall economy these later programs have been steps in the direction indicated by Marshall; however, they have not been structured or financed at the level necessary to foster significant population and industry redistribtuion.

The principles discussed thus far provide a framework for devising an effective solution to poverty in our rural and urban areas. They may be implemented through expansion of urban programs, rural programs, or both. Regardless of which approach is used, public investment and government action would of necessity play a major role.

The solution to poverty in our rural and urban areas must be physically possible, politically acceptable, and economically feasible. An analysis mechanism for illustrating the economic effects of proposed soutions is shown in Figure IV.

Assuming first that only land and labor are needed for production, we will divide our economy into Area A which is a sparsely settled rural district and Area B which is a congested urban center. Assume, secondly, that both areas have the same production function (determined by the state of technology) and equal comparative external advantages. Assume, lastly, that the marginal value product of labor (MVP_L) curve reflects real wages in accordance with Marshall's district analysis. Since area A is a sparsely settled rural area, it is in the increasing returns portion of its production function, but it has unemployment, underemployment and a low MVP_L (wages). Area B, a congested urban area, is operating on the decreasing returns portion of its production function. This is characterized by relatively high MVP_L (wages) and little or no underemployment; however, unemployment is present. The conditions in these two areas approximate the conditions existing in our economy today.

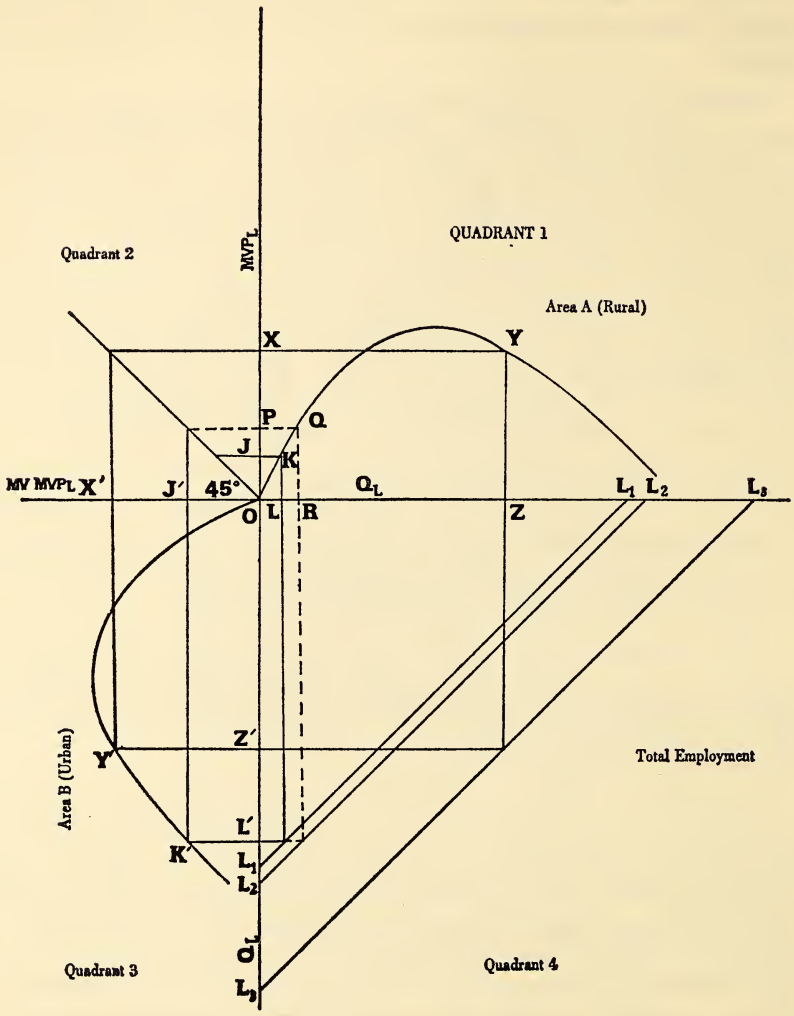
Quadrant 2
MVP$_L$
QUADRANT 1
Area A (Rural)
X
Y
P
Q
J
K
MV MVP$_L$ X'
J'
45°
O
L
R
Q$_L$
Z
L$_1$ L$_2$
L$_3$
Z'
Y'
Area B (Urban)
Total Employment
L'
K'
L$_1$
L$_2$
Q$_L$
L$_3$
Quadrant 3
Quadrant 4

FIGURE IV

It is granted that full employment in the entire economy may be achieved by altering the economic activity in Area B, but this would result in increasing the returns to land while decreasing returns to labor. In addition, public action would have to be enormous. On the other hand, public investment in Area A which increase the MVP_L would have positive proportional effects on the returns to labor [See the discussion relative to figure 3 *supra.*]

Figure IV is made up of four quadrants. Quadrant 1 contains a reflection of the marginal value product curve or marginal real income curve similar to the one in Figure III. The average value product curve has been deleted to prevent cluttering up the graph. Quadrant 3 is an inverse of the marginal value product curve in Quadrant 1. This enables the illustration of a hypothetical economy made up of a rural and an urban area. A forty-five degree transfer line has been inserted in Quadrant 2 so an equilibrium level of employment and wages between the two areas can be found. Quadrant 4 contains a straight line connecting the two quantity-of-labor axes, Q_L. It is drawn between the point on each Q_L axis where Q_L equals employment in Area A plus employment in Area B. [To construct this total employment line lay off the employment in Area A plus the employment in Area B on the horizontal Q_L axis and also on the vertical Q_L axis. Connect the two points. Since two sides of the triangle formed are equal, this line must therefore make a forty-five degree angle with each Q_L axis.] The position and length of this line illustrate unemployment, full employment, and employment shifts in our hypothetical economy. Now it is possible to illustrate how investment programs can bring about better population balance, optimize real income, and eliminate poverty.

The original situation is illustrated in Figure IV as follows: In Area A the Marginal Value Product of Labor (MVP_L) is K; total employment is the projection of K on the Quantity of Labor axis, Q_L, or employment is equal to OL; total wages in Area A is the projection of K on the MVP_L axis, or total wages are equal to OJ. In Area B the Marginal Value Product of Labor is K; total employment in Area B is OL′, total wages in Area B are OJ′. Note that total employment for both areas is shown as OL_1, which is less than full employment which is represented by OL_3.

By public investment and incentive measures the MVP_L (wages) in Area A is increased to Q. Therefore, wages are increased to OP, and employment is increased to OR. At this point there is full employment in Area A, since the wages in the two areas are now equal, thus labor no longer has incentive to move from Area A to Area B. Total employment

has now increased to OL_2, which is the sum of OR and OL'. Total aggregate returns to labor have increased from OJKL plus OJ'K'L' to OPQR + OJ'K'L'.

Even in this improved situation, however, there is not full employment in the economy as a whole. By studying the graph, it can be seen that real income and total employment can be increased by implementing programs that decrease the labor force in Area B and increase the labor force in Area A. The approximate optimum point will occur in the region of the points Y and Y', where Y and Y' represent the intercept of the MVP_L and the AVP_L curves. (See Figure III *supra*). At this point wages in each area are equal to OX, and total employment is OL_3, which is the sum of OZ and OZ'. Total returns to labor would be increased to OXYZ + OX'Y'Z'. The proportional returns relationship between labor and land would be approximately optimum and per capita real income would be approximately optimum.

It is evident that Professor Marshall was on the right road, a road that should now be traveled with extreme haste. His suggestions are relevant to today's environment, but they leave many questions unanswered—such questions as: What is the optimum distribution of people and capital over land and space? What is the best size and structure for modern cities? What legal institutions can facilitate and maintain desirable conditions? Extensive work has been done in recent years on these questions individually. We are now in need of a consolidated and coordinated effort.

The answers to these questions and ultimate solutions to the problem can be found by a multi-discipline approach to Land Economics. Teams of land economists, lawyers, physical and social planners, physical scientists, sociologists, and political scientists could develop approximate optimums and various legal mechanisms for consideration by national, state, and local governments. Specific state and local solutions will vary with areas and conditions. Solutions, nevertheless, can be found if resources and attention are directed in accordance with the magnitude of the problem.

Conditions are such that the objective of national and state policies should be the developing of a politically acceptable program for dispersing population and industry in accordance with the economic principles discussed herein. The specific means of implementing this policy will require much study, planning and discussion. Nevertheless, efforts towards these ends should be pressed by all concerned. Chaos is not static through time, and unless relieved today, we will assuredly have hell tomorrow.

POPULATION MIGRATION EFFECTS ON MISSISSIPPI POVERTY

*Jon P. Thames**

The 1960 census reported 2,178,141 people living in the state of Mississippi.[1] This is 773 fewer people than were reported by the 1950 census.[2] During this ten-year period there were 639,000 births within the State and 206,000 Mississippi people died.[3] Mississippi's net natural increase was, then, 433,000. During the 50's, 42,561 people moved into the State of Misissippi.[4] Totaling the net natural increase (433,000), the in-migration (42,561) and the population loss (773) reveals that from 1950 to 1960 more than 476,000 Mississippi people found it necessary to leave the state.

It is true that the net population change was almost negligible if considered in terms of numbers alone. If, however, the change or lack of change is considered in light of changes in the rest of the nation then the effect on Mississippi's relative position is apparent. The following graph should indicate that Mississippi is being left behind, at least in population, by standing still.

TABLE I

COMPARATIVE POPULATION (by 1000's)[5]

	United States		South		Mississippi	
Year	Population	Growth Rate	Population	Growth Rate	Population	Growth Rate
1930	122,775		37,856		2,010	
		7.3%		10.1%		8.7%
1940	131,669		41,666		2,184	
		14.5%		13.3%		-0.2%
1950	150,697		47,197		2,179	
		18.5%		16.5%		-0.0%
1960	179,326		54,963		2,178	

Although the state is not growing in population, it continues to be among the leaders in producing people. The 1940 census ranked the southern states in the following order:

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* *Assistant editor, Mississippi Law Journal.*

[1] G. Wilber and E. Bryant, *Illustrative Projections of Mississippi Population 1960 to 1985* 6, SOCIOLOGY AND RURAL LIFE SERIES No. 14, Mississippi State University Agricultural Experiment Station (1964). (Hereinafter cited as Wilber & Bryant).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] Wilber & Bryant 2, (based on statistics contained in table 1-1).

TABLE 2

NET REPRODUCTION RATE BY RESIDENCE, 1940[6]

United States	96
Florida	90
Tennessee	107
Georgia	108
Louisiana	109
North Carolina	117
Alabama	121
Arkansas	122
Kentucky	125
South Carolina	125
Mississippi	128

(A rating of 100 means birth rate equals death rate. Mississippi's rating indicates a 28% increase each generation.)

From 1940 to 1950, Mississippi continued to lead the south in procreation while dropping 0.2 percent in total population.

TABLE 3

FERTILITY RATIO, 1950[7]

(Number of children under 5 per 100,000 women of child bearing age.)

State	*Ratio*
Florida	454.1
Tennessee	495.6
North Carolina	523.0
Georgia	524.5
Alabama	536.7
Louisiana	541.8
Kentucky	543.6
Arkansas	554.7
South Carolina	568.7
Mississippi	590.6

Mississippi is perhaps the most active of states in at least talking of her efforts at economic advancement. The state has elaborate machinery for promoting the advantages of Mississippi. In this promotion the most often heard phrase is, "Mississippi's greatest natural resource is her people." The above figures reveal that the State is extremely proficient in production of this resource. Unfortunately, they also reveal that the state is unable to retain that production.

[6] J. Belcher and M. King, *Mississippi's People* 16, Bureau of Public Administration, University of Mississippi (1950).

[7] J. Burrus, M. King, and H. Pederson, *Mississippi's People—1950* 19, Bureau of Public Administration, University of Mississippi (1955).

It is not a foregone conclusion that Mississippi's people are a state resource. If they add nothing to the productivity of the state, then from a strictly economic position it might be wise to encourage their relocation. Before implementing a "citizen retention" program of any sort the out-migrants must be carefully studied to determine their "desirability."

The first problem is "What portion of the population is the state losing?"

Relative statistics reveal that Mississippi is losing:

(1) More Males than Females

TABLE 4

MALES PER 100 FEMALES[8]

1910	101.6
1920	100.4
1930	100.0
1940	98.7
1950	97.7
1960	96.2

This has an effect on the State's relative economic position in that it makes it more difficult for the State to realize its goal of raising the per capita income to seventy-five percent of the national average. To do so, the state must either stop the outflow of males or provide highly productive jobs for females.

(2) The state is losing people in the middle age group, especially those aged 20-44.

TABLE 5

PERCENT DISTRIBUTION BY BROAD AGE GROUPS, MISSISSIPPI, 1900-1960.[9]

Year	Under 20	20-44	45-64	64 and over
1900	53.3	33.2	10.6	3.1
1910	49.1	34.7	10.7	4.2
1920	49.2	34.3	12.6	3.9
1930	46.6	35.5	14.0	3.6
1940	43.2	36.9	14.7	5.3
1950	43.0	33.7	16.2	7.0
1960	44.8	28.0	18.4	8.7

Mississippi is, then, losing most heavily from the younger portion of her population, especially from that group just entering productive capacity. The figures show a loss from 1950 to 1960 of seventeen percent of age 20-44. There is a net gain in the below 20, the 45-64 and over

[8] Wilber & Bryant 12 (based on statistics contained in table 1-9).
[9] Wilber & Bryant 10.

65 age groups. Our population is becoming older, though the gain in number of young may prove significant. It is important to note that, in 1960, 53.5 percent of the population was under 20 or 65 and older. More than half the state's population fell into the traditionally non-productive age group.

(3) The state is losing far more Negro citizens than white citizens:

TABLE 6

RACIAL COMPOSITION OF THE POPULATION OF MISSISSIPPI[10]

1900-1960

Year	Population	Percent White	Percent Non-White
1900	1,551,270	41.3	58.7
1910	1,797,114	43.7	56.3
1920	1,790,618	47.7	52.3
1930	2,009,821	49.7	50.3
1940	2,183,796	50.7	49.3
1950	2,178,914	54.6	45.4
1960	2,178,141	57.7	42.3

Mississippi leads the other southern states in Negro out-migrants by a substantial margin.

TABLE 7

OUT-MIGRATION OF NEGROES

State	1940-50[11]	1950-60[12]
Virginia	26,000	70,000
Tennessee	47,000	57,000
Texas	101,000	27,000
Louisiana	145,000	92,000
Arkansas	157,000	150,000
North Carolina	162,000	207,000
Alabama	202,000	224,000
South Carolina	207,000	218,000
Georgia	240,000	204,000
Mississippi	326,000	323,000
Total	1,613,000	1,572,000

[10] *Id.* at 9, (Based on chart 1-7).

[11] *The Race Problem Moves North*, U.S. NEWS AND WORLD REPORT, Aug. 23, 1957, p. 72.

[12] *Migration of Negroes—Here is Real Story*, U.S. NEWS & WORLD REPORT, May 7, 1962, p. 54.

The South's twenty-year (1940-1960) total of Negro out-migrants is 3,185,000 Negroes. Mississippi alone lost 649,000 Negroes. This exodus continues and is gaining momentum. The Federal Government released figures showing that more than two million Negroes left the South between 1960 and 1965.[13] For this five-year period the percentage of Negroes living in the South dropped from 60 percent to 53.6 percent.[14]

The following series of charts represent graphically the migration problem and they attempt to project the State's relative position to 1985. These statistics were compiled by the Mississippi State University's Agricultural Experiment Station.

Net population of a state varies as net migration rate, birth rate, and/or mortality rate vary. The projections were based on the following assumptions as to these variables:[15]

1. The death rate will continue to decline until 1970 then level off.

2. The birth rate will: (a) remain the same; (b) decrease 5 percent.

3. Migration will: (a) remain at the 1940-1950 level; (b) increase 25 percent; (c) decrease 25 percent.

Pictured graphically, one can see that these assumptions will yield four series of projections.

TABLE 8

ASSUMPTIONS[16]

Series	I	II	III	IV
Net Migration	Decrease 1940-1950 losses by 25%	1940-1950 level continues		Increases 1940-1950 losses by by%
Birth Rate	1940-1950 level continues		1940-1950 level reduced by 5%	
Mortality Rate	Continuation of the 1930-54 rate of decline until 1970 followed by leveling off until 1985.			

As the following table indicates, even the most optimistic of these series does not show a net in-migration until 1980-1985.

[13] U. S. NEWS & WORLD REPORT, Dec. 19, 1966, p. 15.

[14] *Id.*

[15] Wilber & Bryant 22.

[16] *Id.*

TABLE 9

COMPONENTS OF POPULATION CHANGE, MISSISSIPPI, 1960 TO 1985.[17]

Period	Births	Natural Deaths	Increase	Net Migration	Net Change
			Series I		
1960-65	289,810	103,468	186,342	— 70,874	115,468
1965-70	327,755	104,428	223,327	— 55,938	167,389
1970-75	370,704	110,794	259,910	— 37,324	222,586
1975-80	410,211	117,743	292,468	— 14,549	277,919
1980-85	452,702	124,530	328,172	17,728	345,900
			Series II		
1960-65	284,535	103,278	181,257	—125,573	55,684
1965-70	309,390	102,808	206,582	—111,996	94,586
1970-75	337,130	107,583	229,547	— 96,191	133,356
1975-80	370,535	112,978	257,557	— 78,960	178,597
1980-85	384,288	117,337	266,951	— 56,529	210,422
			Series III		
1960-65	270,256	102,788	167,468	—125,223	42,245
1965-70	293,870	102,312	191,558	—110,873	80,685
1970-75	321,090	107,115	213,975	— 94,481	119,494
1975-80	342,572	112,261	230,311	— 76,155	154,156
1980-85	359,415	116,683	242,732	— 53,243	189,489
			Series IV		
1960-65	265,141	102,608	162,533	—179,675	—17,142
1965-70	276,186	100,723	175,463	—161,673	1,379
1970-75	290,541	104,248	186,293	—143,357	42,936
1975-80	300,385	107,594	192,791	—124,703	68,088
1980-85	305,776	110,130	195,646	—104,487	91,159

[17] *Id.* at 54. (Tables 9 through 21 and figures 1 through 4 are based on data taken from the Mississippi Collection, the University of Mississippi Library, University, Mississippi.)

TABLE 10

THE IMPACT OF NET MIGRATION ON NATURAL INCREASE, MISSISSIPPI, 1950-60, AND PROJECTIONS TO 1985.[18]

Years	Net Migration as a Percent of Natural Increase		
	Total	White	Nonwhite
1950-60	—100.2	—61.1	—128.3
	Series I		
1960-65	— 38.0	11.8	— 74.1
1965-70	— 25.0	23.9	— 64.6
1970-75	— 14.4	32.1	— 60.0
1975-80	— 5.0	37.9	— 57.1
1980-85	5.1	43.4	— 54.5
	Series II		
1960-65	— 69.3	—19.6	—104.3
1965-70	— 54.2	—13.2	— 91.7
1970-75	— 41.9	13.4	— 84.3
1975-80	— 30.7	23.1	— 76.0
1980-85	— 21.2	31.2	— 78.1
	Series III		
1960-65	— 74.8	—21.7	—111.5
1965-70	— 57.9	—17.0	— 97.0
1970-75	— 44.2	14.0	— 88.6
1975-80	— 33.0	24.0	— 84.3
1980-85	— 21.9	32.5	— 81.7
	Series IV		
1960-65	—110.5	—59.6	—145.9
1965-70	— 92.1	—40.5	—128.2
1970-75	— 77.0	—22.1	—116.9
1975-80	— 64.7	— 6.3	—110.5
1980-85	— 53.4	8.7	—106.0

A breakdown by race shows that the Negro will continue to be the source of greatest loss.

[18] *Id.* at 55.

TABLE 11

NET MIGRATION AND NET MIGRATION RATES,[a] BY RACE, MISSISSIPPI, 1950-60, AND PROJECTIONS TO 1985.[19]

	TOTAL		WHITE		NONWHITE	
Years	Number	Percent	Number	Percent	Number	Percent
1950-60[b]	−424,158	−16.3	−108,469	−7.9	−315,688	−25.5
			Series I			
1960-65	− 70,874	− 3.0	10,278	0.8	− 81,152	− 7.9
1965-70	− 55,938	− 2.1	28,952	2.0	− 84,890	− 7.9
1970-75	− 37,324	− 1.4	51,935	3.3	− 89,259	− 7.8
1975-80	− 14,549	− 0.5	78,681	4.5	− 93,230	− 7.6
1980-85	17,728	0.5	114,996	5.8	− 97,268	− 7.5
			Series II			
1960-65	−125,573	− 5.3	− 14,705	−1.1	−110,868	−10.8
1965-70	−111,996	− 4.6	− 1,130	−0.1	−110,866	−10.7
1970-75	− 96,191	− 3.8	15,150	1.0	−111,341	−10.5
1975-80	− 78,960	− 2.9	33,076	2.0	−112,036	−10.2
1980-85	− 56,529	− 1.9	55,838	3.1	−112,367	−10.0
			Series III			
1960-65	−125,223	− 5.3	− 14,875	−1.1	−110,348	−10.8
1965-70	−110,873	− 4.6	− 1,336	−0.1	−109,537	−10.7
1970-75	− 94,481	− 3.8	14,781	1.0	−109,262	−10.5
1975-80	− 76,155	− 2.9	32,153	2.0	−108,308	−10.3
1980-85	− 53,243	− 1.9	53,821	3.1	−107,064	− 9.9
			Series IV			
1960-65	−179,675	− 7.7	− 39,757	−3.0	−139,918	−13.8
1965-70	−161,673	− 6.9	− 29,218	−2.2	−132,455	−13.5
1970-75	−143,357	− 6.1	− 17,346	−1.2	−126,011	−13.2
1975-80	−124,703	− 5.2	− 5,372	−0.4	−119,331	−12.7
1980-85	−104,487	− 4.2	8,469	0.5	−112,956	−12.2

[a] Percent migrating of those surviving to end of projection period.

[b] See *Net Migration in Mississippi, 1950 to 1960,* by Ellen S. Bryant and G. L. Wilber, Agricultural Experiment Station Bulletin 632, State College: Mississippi State University, December 1961.

A further breakdown by sex of migrant shows the Negro male heading the movement from Mississippi.

[19] *Id.* at 51.

TABLE 12

NET MIGRATION[a] AND NET MIGRATION RATES BY RACE AND SEX, MISSISSIPPI, 1950-60, AND PROJECTIONS TO 1985.[20]

	White				Nonwhite			
Years	Male	Percent	Female	Percent	Male	Percent	Female	Percent
1950-60[b]	−54.1	−8.0	−53.8	−7.9	−163.0	−26.9	−152.6	−24.2
			Series I					
1960-65	7.3	1.1	2.9	0.4	− 42.4	− 8.5	− 38.7	− 7.3
1965-70	18.0	2.5	11.0	1.5	− 44.8	− 8.5	− 40.1	− 7.2
1970-75	30.4	3.9	21.5	2.7	− 47.2	− 8.5	− 42.0	− 7.1
1975-80	44.1	5.0	34.6	3.9	− 49.3	− 8.3	− 43.9	− 7.0
1980-85	63.0	6.3	52.0	5.3	− 51.4	− 8.0	− 45.9	− 6.9
			Series II					
1960-65	− 5.6	−0.9	− 9.1	−1.3	− 57.6	−11.6	− 53.3	−10.1
1965-70	2.0	0.3	− 3.1	−0.4	− 57.9	−11.5	− 52.9	− 9.9
1970-75	10.7	1.4	4.4	0.6	− 58.3	−11.4	− 53.0	− 9.7
1975-80	19.8	2.4	13.3	1.6	− 58.6	−11.0	− 53.4	− 9.5
1980-85	31.6	3.4	24.2	2.7	− 58.8	−10.7	− 53.6	− 9.3
			Series III					
1960-65	− 5.8	−0.9	− 9.1	−1.4	− 57.3	−11.6	− 53.1	−10.1
1965-70	1.8	0.3	− 3.2	−0.5	− 57.2	−11.6	− 52.4	− 9.9
1970-75	10.5	1.4	4.3	0.6	− 57.2	−11.4	− 52.1	− 9.7
1975-80	19.2	2.4	12.9	1.6	− 56.6	−11.1	− 51.7	− 9.5
1980-85	30.5	3.5	23.4	2.7	− 55.8	−10.7	− 51.3	− 9.2
			Series IV					
1960-65	−18.7	−2.8	−21.1	−3.2	− 72.4	−14.7	− 67.5	−12.9
1965-70	−13.0	−1.9	−16.3	−2.4	− 68.7	−14.5	− 63.8	−12.6
1970-75	− 6.7	−1.0	−10.7	−1.5	− 65.4	−14.2	− 60.7	−12.2
1975-80	− 0.8	−0.1	4.6	−0.6	− 61.7	−13.7	− 57.6	−11.9
1980-85	6.4	0.8	2.1	0.3	− 58.3	−13.1	− 54.7	−11.4

[a] By 1000's.

[b] See *Net Migration in Mississippi, 1950 to 1960*, by Ellen S. Bryant and G. L. Wilber, Agricultural Experiment Station Bulletin 632. State College: Mississippi State University, December 1961.

Migration will continue to be greatest in the most productive age brackets.

[20] *Id.* at 52.

TABLE 13

TOTAL POPULATION NET MIGRATION, BY BROAD AGE GROUPS, MISSISSIPPI, 1960 TO 1985.[21]

Age At End Of Period	1960-65	1965-70	1970-75	1975-80	1980-85
			Series I		
Total	– 70,874	– 55,938	– 37,324	– 14,549	17,728
Under 20	– 32,030	– 20,624	– 11,987	– 2,373	14,365
20-44	– 34,690	– 33,860	– 26,603	– 16,118	– 3,195
45-64	– 5,858	– 3,743	– 1,528	563	2,619
65 and over	1,704	2,289	2,794	3,379	3,939
			Series II		
Total	–125,573	–111,996	– 96,191	– 78,960	– 56,529
Under 20	– 58,019	– 46,990	– 39,189	– 32,889	– 22,639
20-44	– 56,620	– 56,869	– 51,573	– 43,422	– 33,671
45-64	– 11,161	– 8,711	– 6,210	– 3,819	– 1,759
65 and over	227	574	781	1,170	1,540
			Series III		
Total	–125,223	–110,873	– 94,481	– 76,155	– 53,243
Under 20	– 57,669	– 45,867	– 37,479	– 30,084	– 19,704
20-44	– 56,620	– 56,869	– 51,573	– 43,422	– 33,320
45-64	– 11,161	– 8,711	– 6,210	– 3,819	– 1,759
65 and over	227	574	781	1,170	1,540
			Series IV		
Total	–179,675	–161,673	–143,357	–124,703	–104,487
Under 20	– 83,402	– 69,781	– 60,171	– 52,464	– 44,501
20-44	– 78,555	– 77,311	– 71,599	– 63,726	– 54,004
45-65	– 16,471	– 13,478	– 10,503	– 7,644	– 5,360
65 and over	– 1,247	– 1,103	– 1,084	– 869	– 622

[21] *Id.* at 64.

TABLE 14

TOTAL POPULATION NET MIGRATION RATES BY BROAD AGE GROUPS, MISSISSIPPI, 1960 TO 1985.[22]

Age At End Of Period	1960-65	1965-70	1970-75	1975-80	1980-85
			Series I		
Total	– 3.1	– 2.3	– 1.4	– 0.5	0.5
Under 20	– 3.1	– 1.9	– 1.0	[a]	1.0
20-44	– 5.4	– 4.7	– 3.2	– 1.8	[a]
45-64	– 1.4	– 0.9	[a]	[a]	0.6
65 and over	0.8	1.0	1.1	1.2	1.4
			Series II		
Total	– 5.6	– 4.8	– 3.9	– 3.0	– 2.0
Under 20	– 5.8	– 4.6	– 3.6	– 2.8	– 1.8
20-44	– 9.0	– 8.5	– 7.0	– 5.2	– 3.6
45-64	– 2.7	– 2.1	– 1.6	– 1.0	0.5
65 and over	[a]	[a]	[a]	[a]	0.6
			Series III		
Total	– 5.6	– 4.1	– 3.9	– 3.0	– 1.9
Under 20	– 5.9	– 4.6	– 3.6	– 2.7	– 1.6
20-44	– 9.0	– 8.4	– 7.0	– 5.2	– 3.6
45-64	– 2.7	– 2.1	– 1.6	– 1.0	– 0.5
65 and over	[a]	[a]	[a]	[a]	0.6
			Series IV		
Total	– 8.3	– 7.4	– 6.5	– 5.5	– 4.4
Under 20	– 8.8	– 7.5	– 6.4	– 5.5	– 4.4
20-44	–13.0	–12.4	–10.9	– 8.9	– 7.1
45-64	– 4.1	– 3.4	– 2.8	– 2.2	– 1.6
65 and over	– 0.6	– 0.5	– 0.5	[a]	[a]

[a]Less than 0.5 percent.

The white migration forecast is promising. In-migration of white females will lead in numbers of in-migrants if the study proves accurate. The total number of white in-migrants does not promise to offset losses of the last thirty years for quite some time.

[22] *Id.* at 65.

TABLE 15

WHITE NET MIGRATION BY BROAD AGE GROUPS, MISSISSIPPI, 1960 TO 1985.[23]

Age At End Of Period	1960-65	1965-70	1970-75	1975-80	1980-85
			Series I		
Total	10,278	28,952	51,935	78,681	114,996
Under 20	12,688	24,021	33,937	46,057	66,570
20-44	— 3,237	2,549	13,834	26,602	40,026
45-64	66	1,275	2,612	4,036	5,840
65 and over	761	1,107	1,552	1,986	2,560
			Series II		
Total	—14,705	1,130	15,150	33,076	55,838
Under 20	1,963	10,626	17,582	25,167	37,666
20-44	—14,106	—10,418	— 2,458	6,318	14,726
45-64	— 2,492	— 1,473	— 301	978	2,465
65 and over	— 70	135	327	613	981
			Series III		
Total	—14,875	— 1,336	14,781	32,153	53,821
Under 20	1,793	10,420	17,213	24,244	36,075
20-44	—14,106	—10,418	— 2,458	6,318	14,300
45-64	— 2,492	— 1,473	— 301	978	2,465
65 and over	— 70	135	327	613	981
			Series IV		
Total	—39,757	—29,218	—17,346	5,372	8,469
Under 20	— 8,814	— 2,015	2,805	7,264	14,237
20-44	—24,975	—22,241	—16,315	—10,147	— 4,810
45-64	— 5,063	— 4,143	— 3,050	— 1,823	— 494
65 and over	— 905	— 819	— 786	— 666	— 464

[23] *Id.* at 67.

NET MIGRATION BY BROAD AGE GROUPS, WHITE MALES, MISSISSIPPI, 1960 TO 1985.[24]

TABLE 16

Age At End Of Period	1960-65	1965-70	1970-75	1975-80	1980-85
			Series I		
Total	7,340	17,981	30,444	44,075	62,988
Under 20	9,110	16,524	22,579	28,906	40,713
20-44	– 1,987	529	6,124	12,685	18,780
45-64	– 20	604	1,276	1,956	2,797
65 and over	237	324	456	528	698
			Series II		
Total	– 5,646	1,953	10,744	19,815	31,635
Under 20	3,068	8,600	12,832	16,674	23,887
20-44	– 7,357	– 5,886	– 1,949	2,586	6,383
45-65	– 1,293	– 751	– 156	463	1,154
65 and over	– 64	– 10	17	92	211
			Series III		
Total	– 5,750	1,824	10,488	19,234	30,450
Under 20	2,964	8,471	12,576	16,093	22,915
20-44	– 7,357	– 5,886	– 1,949	2,586	6,170
45-64	– 1,293	– 751	– 156	463	1,154
65 and over	– 64	– 10	17	92	211
			Series IV		
Total	–18,695	–12,963	– 6,680	– 786	6,364
Under 20	– 3,037	1,106	3,935	6,004	10,035
20-44	–12,725	–11,670	– 8,762	– 5,560	– 3,153
45-64	– 2,572	– 2,063	– 1,503	– 915	– 285
65 and over	– 361	– 336	– 350	– 315	– 233

[24] *Id.* at 69.

TABLE 17

NET MIGRATION BY BROAD AGE GROUPS, WHITE FEMALES, MISSISSIPPI, 1960 TO 1985.[25]

Age At End Of Period	1960-65	1965-70	1970-75	1975-80	1980-85
			Series I		
Total	2,938	10,971	21,491	34,606	52,008
Under 20	3,578	7,497	11,358	17,151	25,857
20-44	– 1,250	2,020	7,710	13,917	21,246
45-64	86	671	1,336	2,080	3,043
65 and over	524	783	1,087	1,458	1,862
			Series II		
Total	– 9,059	– 3,083	4,406	13,261	24,203
Under 20	– 1,105	2,026	4,750	8,493	13,779
20-44	– 6,749	– 4,532	– 509	3,732	8,343
45-64	– 1,199	– 722	– 145	515	1,311
65 and over	– 6	145	310	521	770
			Series III		
Total	– 9,125	– 3,160	4,293	12,919	23,371
Under 20	– 1,171	1,949	4,637	8,151	13,160
20-44	– 6,749	– 4,532	– 509	3,732	8,130
45-64	– 1,199	– 722	– 145	515	1,311
65 and over	– 6	145	310	521	770
			Series IV		
Total	–21,062	–16,255	–10,666	– 4,586	2,105
Under 20	– 5,777	– 3,121	– 1,130	1,260	4,202
20-44	–12,250	–10,571	– 7,553	– 4,587	– 1,657
45-64	– 2,491	– 2,080	– 1,547	– 908	– 209
65 and over	– 544	– 483	– 436	– 351	– 231

Out-migration of Negroes in the most productive age groups will continue to be a serious problem. Even the most optimistic projection does not suggest a significant improvement. The charts suggest that Negro women twenty to forty-four years of age will begin to leave in about the same proportion as Negro men of the same age.

[25] *Id.* at 70.

TABLE 18

NONWHITE NET MIGRATION BY BROAD AGE GROUPS, MISSISSIPPI, 1960 TO 1985.[26]

Age At End Of Period	1960-65	1965-70	1970-75	1975-80	1980-85
			Series I		
Total	– 81,152	– 84,890	– 89,259	– 93,230	– 97,268
Under 20	– 44,718	– 44,645	– 45,924	– 48,430	– 52,205
20-44	– 31,453	– 36,409	– 40,437	– 42,720	– 43,221
45-64	– 5,924	– 5,018	– 4,140	– 3,473	– 3,221
65 and over	943	1,182	1,242	1,393	1,379
			Series II		
Total	–110,868	–110,866	–111,341	–112,036	–112,367
Under 20	– 59,982	– 57,616	– 56,771	– 58,056	– 60,305
20-44	– 42,514	– 46,451	– 49,115	– 49,740	– 48,397
45-64	– 8,669	– 7,238	– 5,909	– 4,797	– 4,224
65 and over	297	439	454	557	559
			Series III		
Total	–110,348	–109,537	–109,262	–108,308	–107,064
Under 20	– 59,462	– 56,287	– 54,692	– 54,328	– 55,779
20-44	– 42,514	– 46,451	– 49,115	– 49,740	– 47,620
45-64	– 8,669	– 7,238	– 5,909	– 4,797	– 4,224
65 and over	297	439	454	557	559
			Series IV		
Total	–139,918	–132,455	–126,011	–119,331	–112,956
Under 20	– 74,588	– 67,766	– 62,976	– 59,728	– 58,738
20-44	– 53,580	– 55,070	– 55,284	– 53,579	– 49,194
45-64	– 11,408	– 9,335	– 7,453	– 5,821	– 4,866
65 & over	– 342	– 284	– 298	– 203	– 158

[26] *Id.* at 68.

TABLE 19

NET MIGRATION BY BROAD AGE GROUPS, NONWHITE MALES, MISSISSIPPI, 1960 TO 1985:[27]

Age At End Of Period	1960-65	1965-70	1970-75	1975-80	1980-85
			Series I		
Total	–42,438	–44,763	–47,232	–49,324	–51,394
Under 20	–24,297	–24,236	–24,978	–26,461	–28,515
20-44	–15,801	–18,770	–20,974	–21,964	–22,095
45-64	– 2,543	– 2,036	– 1,606	– 1,300	– 1,220
65 and over	203	279	326	401	436
			Series II		
Total	–57,617	–57,947	–58,299	–58,644	–58,766
Under 20	–32,588	–31,259	–30,816	–31,659	–32,916
20-44	–21,348	–23,806	–25,272	–25,323	–24,432
45-64	– 3,636	– 2,885	– 2,254	– 1,771	– 1,574
65 and over	– 45	3	43	109	156
			Series III		
Total	–57,290	–57,178	–57,165	–56,593	–55,810
Under 20	–32,262	–30,490	–29,682	–29,608	–30,384
20-44	–21,348	–23,806	–25,272	–25,323	–24,008
45-64	– 3,636	– 2,885	– 2,254	– 1,771	– 1,574
65 and over	– 45	3	43	109	156
			Series IV		
Total	–72,416	–68,692	–65,359	–61,722	–58,274
Under 20	–40,502	–36,694	–34,115	–32,473	–31,959
20-44	–26,899	–28,040	–28,189	–26,957	–24,425
45-64	– 4,726	– 3,690	– 2,819	– 2,131	– 1,791
65 and over	– 289	– 268	– 236	– 161	– 99

[27] *Id.* at 71.

TABLE 20

NET MIGRATION BY BROAD AGE GROUPS, NONWHITE FEMALES, MISSISSIPPI, 1960 TO 1985.[28]

Age At End Of Period	1960-65	1965-70	1970-75	1975-80	1980-85
			Series I		
Total	–38,,714	–40,127	–42,027	–43,906	–45,874
Under 20	–20,421	–20,409	–20,946	–21,969	–23,690
20-44	–15,652	–17,639	–19,463	–20,756	–21,126
45-64	– 3,381	– 2,982	– 2,534	– 2,173	– 2,001
65 and over	740	903	916	992	943
			Series II		
Total	–53,251	–52,919	–53,042	–53,392	–53,601
Under 20	–27,394	–26,357	–25,955	–26,397	–27,389
20-44	–21,166	–22,645	–23,843	–24,417	–23,965
45-64	– 5,033	– 4,353	– 3,655	– 3,026	– 2,650
65 and over	342	436	411	448	403
			Series III		
Total	–53,058	–52,359	–52,097	–51,715	–51,254
Under 20	–27,201	–25,797	–25,010	–24,720	–25,395
20-44	–21,166	–22,645	–23,843	–24,417	–23,612
45-64	– 5,033	– 4,353	– 3,655	– 3,026	– 2,650
65 and over	342	436	411	448	403
			Series IV		
Total	–67,502	–63,763	–60,652	–57,609	–54,682
Under 20	–34,086	–31,072	–28,861	–27,255	–26,779
20-44	–26,681	–27,030	–27,095	–26,622	–24,769
45-64	– 6,682	– 5,645	– 4,634	– 3,690	– 3,075
65 and over	– 53	– 16	– 62	– 42	– 59

The following graphs are excellent pictorial representations of the problem created by Mississippi's migration patterns. All populations tend to form a pyramid if considered in terms of age of citizens. This is because of the increasing incident of death with each age increment increase.

[28] *Id.* at 72.

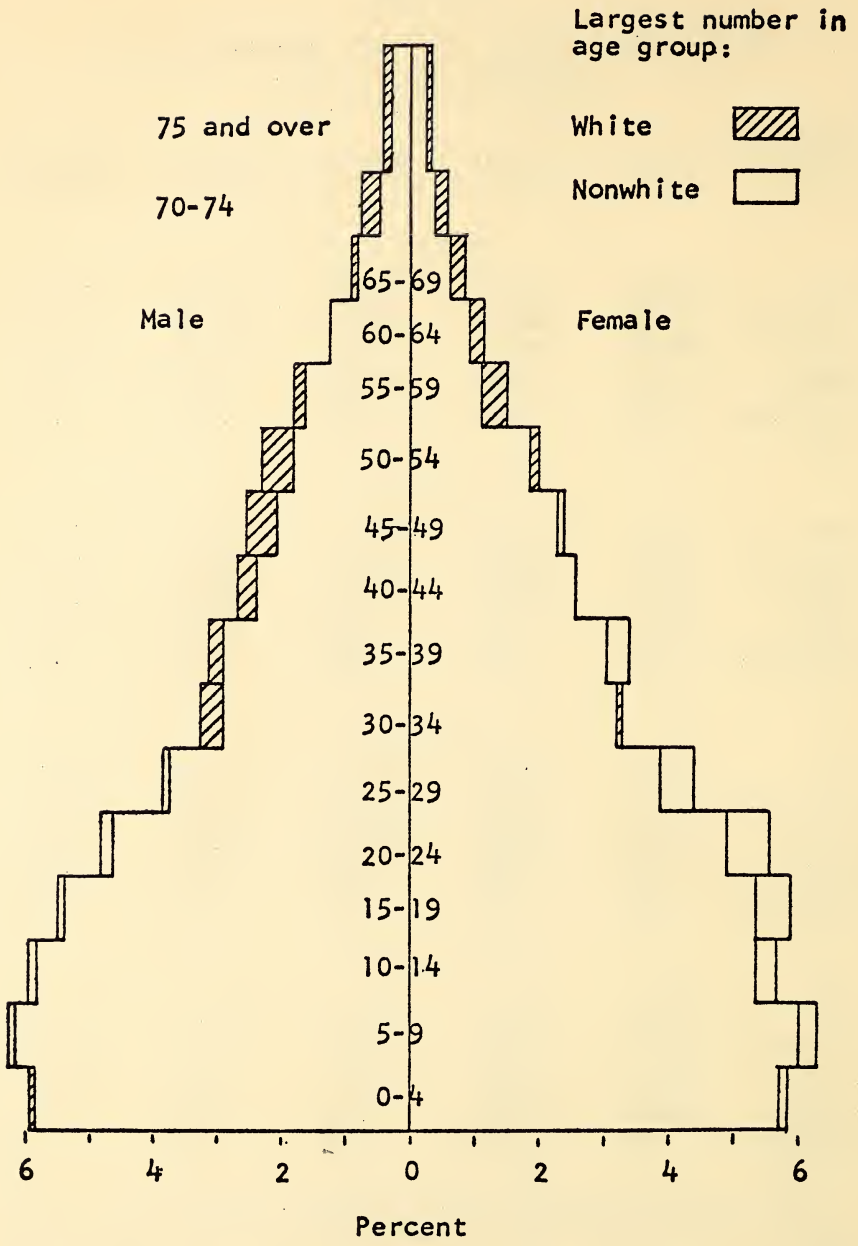

FIGURE 1: AGE-SEX COMPOSITION OF MISSISSIPPI'S POPULATION, BY COLOR, 1930.[29]

[29] *Id.* at 122.

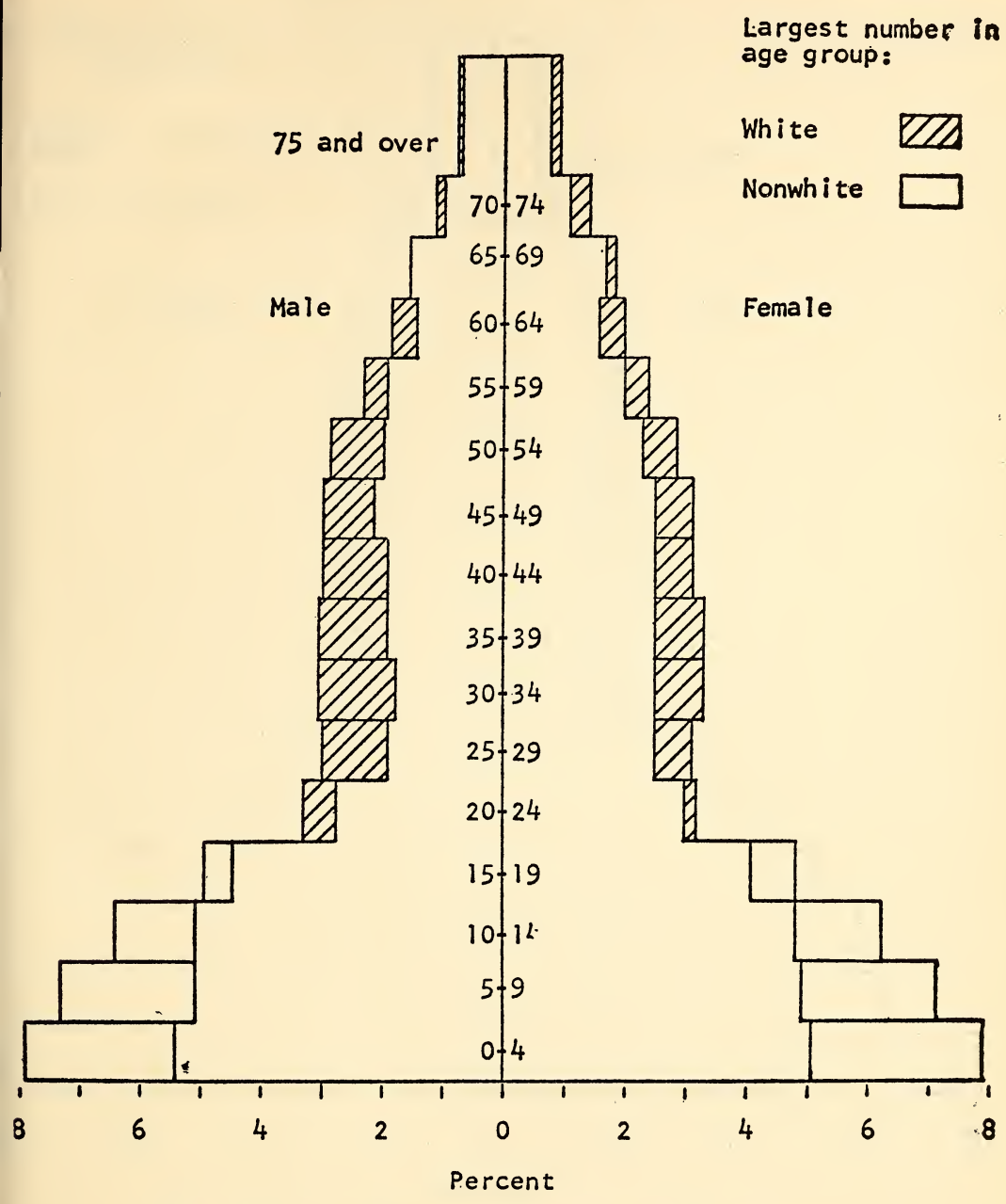

FIGURE 2: AGE-SEX COMPOSITION OF MISSISSIPPI'S POPULATION, BY COLOR, 1960.[30]

[30] *Id.* at 123.

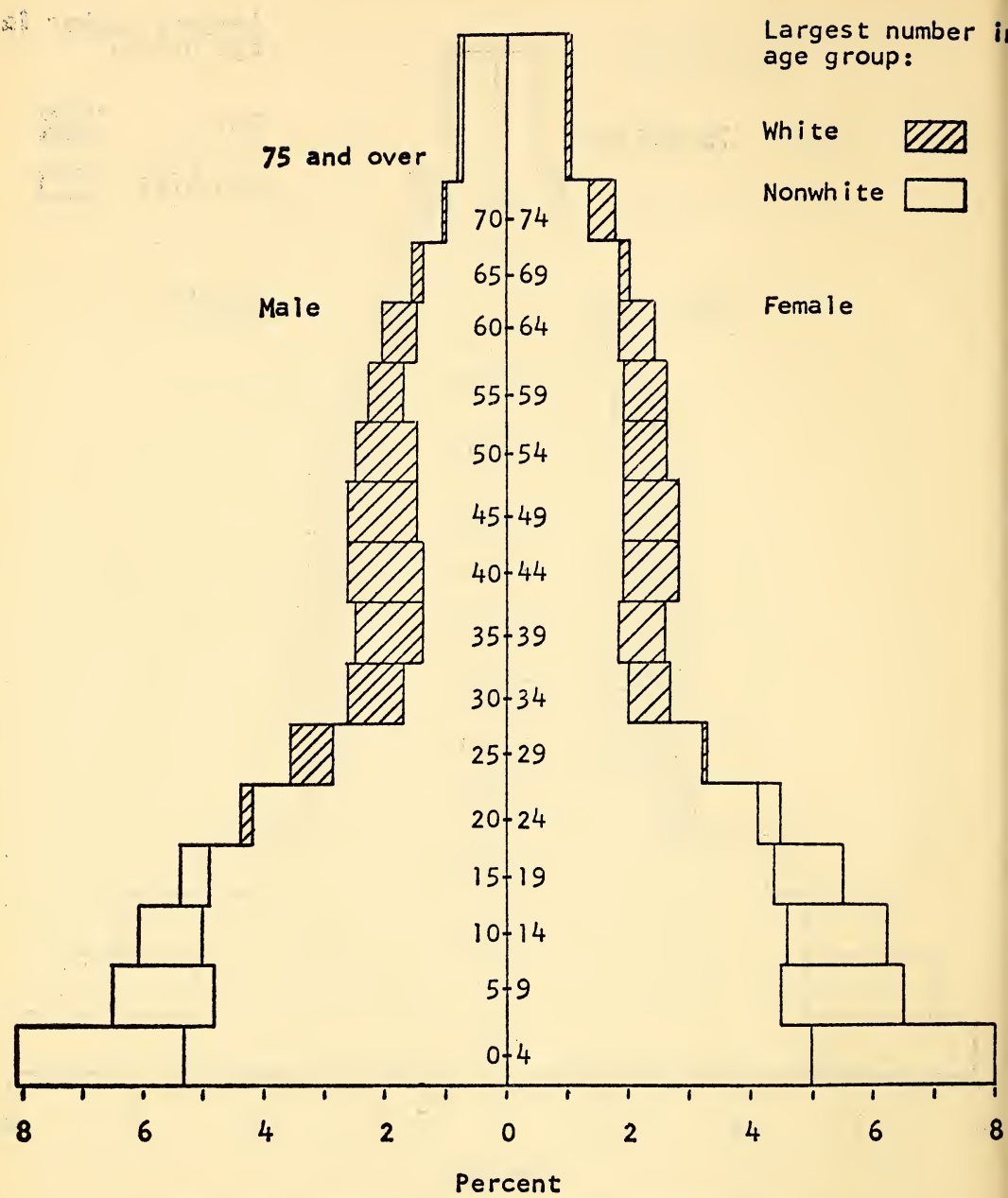

FIGURE 3: AGE-SEX COMPOSITION OF PROJECTED MISSISSIPPI POPULATION, BY COLOR, 1970 (SERIES 11).[31]

[31] *Id.* at 124.

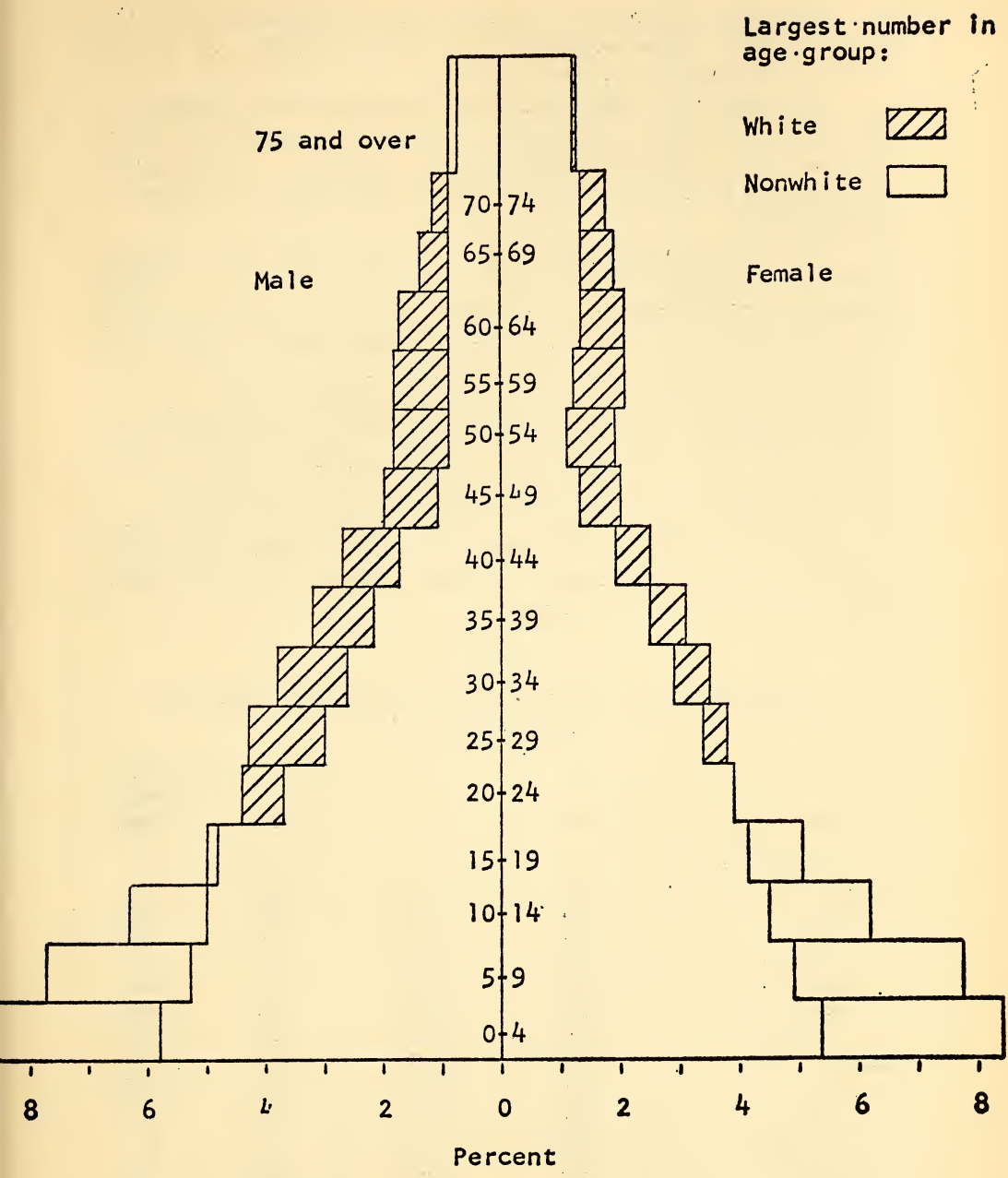

FIGURE 4: AGE-SEX COMPOSITION OF PROJECTED POPULATION, BY COLOR, 1985 (SERIES 11).[32]

[32] *Id.* at 125.

The middle section of the pyramid is the productive portion. The base and apex must be supported. For economic stability, this middle section must not be too severely "pinched".

The graph of the 1930 Mississippi population shows something of the balance necessary. Compare this to the 1960 graph, in particular that part of the graph reflecting the Negro population. The 1970 graph is even more severe. The 1985 graph shows some progress but there is still a problem.

The effect of out-migration on the State's labor force has been drastic. The number of white males in the work force has remained virtually constant during the two decades. The number of Negro males was almost halved. The number of Negro females in the work force also decreased appreciably. The ninety-seven percent increase in white famale workers accounted for the only appreciable growth in this vital production ingredient. Were it not for the increase of white women in the labor market, the state's percent loss in labor available would be about seventeen percent instead of eight percent for the two decades.

Notice that while the 1940 labor market was fifty-two percent Negro, the 1960 labor market is only thirty-seven percent Negro. The Negro proportion of the Mississippi population, during the same period, dropped only about eight percent.

TABLE 21

MISSISSIPPI LABOR FORCE, BY SEX AND COLOR, 1940, 1950 AND 1960 (IN 1000's).[33]

Population characteristics	1960	1950	1940	Percent change, 1940-60
Total population, 14 years old and over	1,439	1,481	1,520	– 5.3
White	893	852	792	12.8
Male	439	424	397	10.6
Female	454	428	395	14.9
Nonwhite	547	629	727	–24.8
Male	255	299	353	–27.8
Female	292	329	374	–21.9
Labor force	743	757	808	– 8.0
White	471	424	387	21.7
Male	326	331	314	3.8
Female	144	93	73	97.3
Nonwhite	272	332	421	–35.4
Male	171	238	298	–42.6
Female	101	94	123	–17.9

Source: Bureau of the Census.

[33] *Id.* at 15.

The Mississippi Economic Council coined, as an economic goal for the State, the phrase "75 by 75."[34] It is their highly laudable desire to aid in raising Mississippi's per capita income to seventy-five percent of the national average by 1975. The council has stated, "Economics required one thing to reach this goal—productivity. The value of production relative to wages must increase before wages can rise."[35]

The latter part of this contention is undoubtedly correct. The former is not. Per capita income is not dependent on wages alone. The relative number of producers is equally as important. If, for example, the economic unit under consideration is composed of one hundred individuals, fifty that don't work and fifty that make $2,000 per year, then

$$\text{per capita income is } \$1{,}000 \left(\frac{50 \times \$2{,}000}{100} = \$1{,}000\right).$$

Raising the salary of twenty-five of the workers to $4,000 and replacing the other twenty-five workers with non-workers does not increase per capita income

$$\left(\frac{25 \times \$4{,}000}{100} = \$1{,}000\right).$$

In Mississippi we are exchanging work for non-workers. Salary increases are necessary just to keep the per capita income stable.

The following chart shows the rate of growth of Mississippi and national per capita income and the significant change in rate of growth of per capita income that will be necessary to achieve "75 by 75."

Since the migration pattern of the Negro contributes most significantly to the problem, it is important to consider the state's attempts at changing this pattern. This writer interviewed community officials and business leaders, Chamber of Commerce managers, and area industrial development leaders all over the state of Mississippi. Only two industrial development leaders were currently engaged in attempting to secure jobs for Negroes, [36] though many admitted a need. It is interesting to note that an effort is being made in McComb, and in McComb a similar effort had been barred by community pressures a few years

[34] *Mississippi Research and Development Council Economic Highlights of Mississippi* 34 (March, 1966).

[35] *Id.*

[36] Interviews with Mr. Frank Oakes, Executive Director of the Southwest Mississippi Development District, in McComb, Mississippi, July 13, 1966; Mr. Floyde Sperry, Executive Director of the Columbus-Lowndes Industrial Foundation, Inc., in Columbus, Mississippi, July 22, 1966.

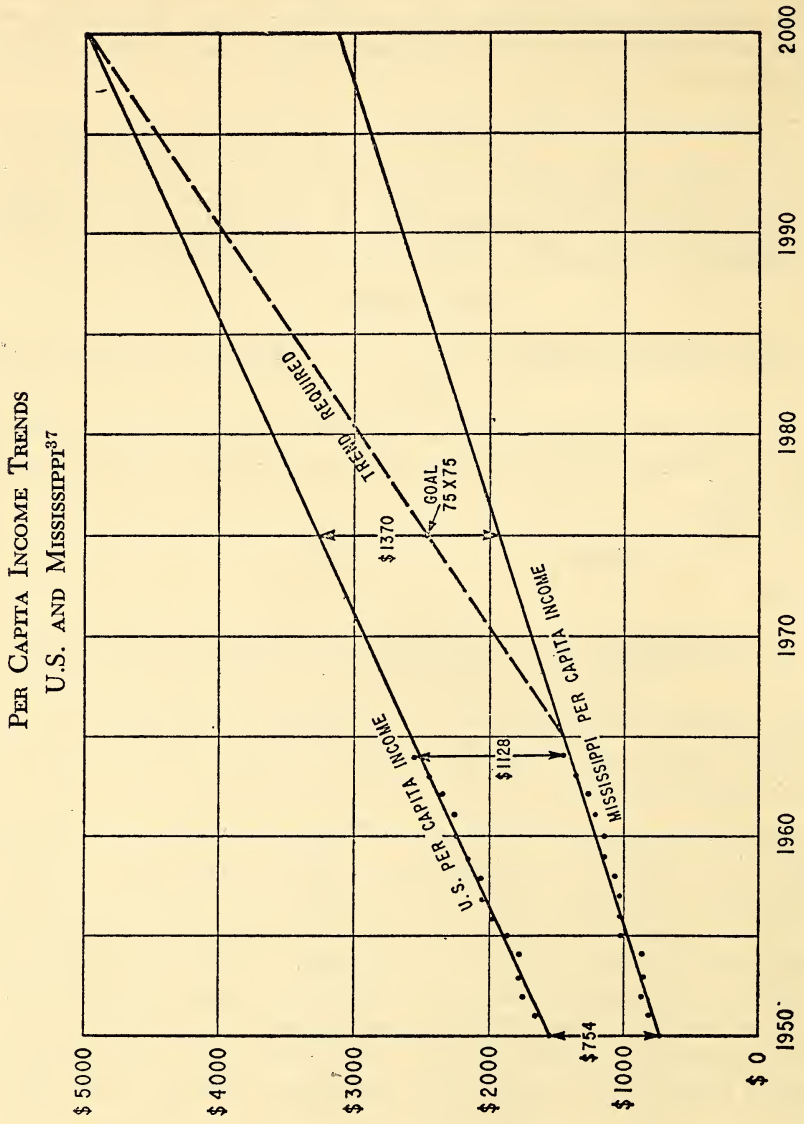

FIGURE 5

[37] J. Peterson, *Economic Highlights of Mississippi* 35, Mississippi Research and Development Center (1966).

before.[38] Perhaps this would indicate that those leaders who would try but for community pressures are barred by fears as much as facts. In at least one area of the state no effort at provision of job opportunities is being made because local leaders see out-migration of Negroes as a solution to a potential "race problem."[39] This possibility will be discussed further in this paper's conclusion.

Before any problem can be solved, those capable of solving it must recognize its existence. The official and quasi-official publications of the State seem so dedicated to ignoring the negative and "latching on to the affirmative" that they do not consider the possibility that a "problem" of any sort even exists. Those publications which recognize such a problem are often prefaced by something such as, "Our committee felt it would not be wise to give undue publicity to some of the unfavorable factors which the study revealed this survey is confidential and not for news release."[40] A national magazine questioned Governor Barnett as to the Negro's future in the State.[41] The dialog was as follows:

Q. How many Negroes are there in Mississippi?

A. About 43 percent of the population is Negro; 57 percent is white. Two years ago it was about 45 percent Negro and 55 percent white.

Q. Then are Negroes leaving Mississippi?

A. Some have left, yes. But they are not leaving in great numbers.

Q. What kinds of people are leaving?

A. I think the better-educated Negroes are staying. Our statistics show that a higher percentage of the graduates of Jackson State College for Negroes remain in Mississippi after graduation than the graduates of any other state-supported college for either race. We believe that the better-educated Negroes stay in Mississippi because they find it easier to secure employment in the fields for which they are qualified. Those Negroes who leave Mississippi are usually the ones unskilled in any type of trade or profession.

Q. Do you think that a wider distribution of the Negro population outside the South would be a good thing?

A. It would be for the South, yes. Then the Northland would better understand our problem.

Q. Do you mean you think the South would be better off with fewer Negroes?

A. Yes.

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[38] Interview with Mr. Oliver Emerich, Editor, The McComb Enterprise-Journal, in McComb, Mississippi, July 13, 1966.

[39] Interview with Mr. Griffen Norquist, County Attorney, Yazoo County, Mississippi, in Yazoo City, Mississippi, July 1, 1966.

[40] Mississippi Economic Council, *Foreword,* CONFIDENTIAL SURVEY ON INDUSTRIAL LOCATION FACTORS (1965).

[41] *The Negro's Future in the South,* U. S. NEWS & WORLD REPORT, June 3, 1963, p. 60.

Summary

Mississippi is not in an enviable economic position. The state's rate of economic growth is well below that of the nation as a whole. BAWI programs and concerted efforts at industrial inducement have not succeeded in closing the relative per capita income gap.[42]

Mississippi is not a storehouse of limitless natural resources. No natural phenomena can be expected to materially alter the State's economic position. If a change is to come, it appears it must come primarily from technological changes in the use of resources and/or labor. The expression "Mississippi's greatest natural resource is her people" might well prove an economic fact.

This paper seeks to put into issue the state's development of the resource her peoples offer; to do so it considers population statistics and draws conclusions from them. Supporting statistics are contained in the preceding text. The reader's consideration of these statistics is invited as are his conclusions.

First Conclusion: Mississippi is losing large numbers of people.[43]

Second Concluson: The state's population loss is primarily from the most productive segment of society.[44]

Third Conclusion: The loss from this group suggests that the major reason for leaving is a desire for economic opportunity.[45]

Fourth Conclusion: The continuing natural increase in state population coupled with the migration loss of the most productive part of the population means that there are growing numbers requiring support and, conversely, fewer capable of providing that support.[46]

The above conclusions are, in this writer's judgment, all sound.

If the reader accepts the conclusions, he must see the snowballing effect of the problem presented.

The obvious solution is provision of economic opportunity for the people of the state. This would mean an increase in cash expenditures. There must be an increase in technical training, services, and other inducements offered to industry.

With Mississippi's low per capita income each tax dollar taken hurts the taxpayer more. The longer the trend continues, the fewer the taxpayers available among whom to spread the taking and the more painful the taking, for the taxpayer needs his dollar to provide for his non-productive dependents. The longer the trend continues, the fewer

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[42] "The gap between Mississippi's per capita income and the U. S. average increased $374 between 1950 and 1964—almost 50 percent." J. Peterson, *Economic Highlights of Mississippi* 34, Mississippi Research and Development Center (1966).

[43] *See* Table 1.

[44] *See Table* 5 and figures 1 and 2.

[45] *See* figure 5 and table 5.

[46] *See* figures 3 and 4.

the tax dollars that can be allocated to increasing productivity and the greater the number of tax dollars necessary to support those depending upon the state.

It seems evident that delay in attempting a solution will be costly. The longer attempted solutions are delayed, the greater the problem becomes and fewer resources are available for the solution.

Before considering a solution one must consider other statistical conclusions which aid in defining the problem.

Fifth Conclusion: The statistics reveal that the problem of loss of producers and retention of non-producers is greatly magnified in the Negro community.[47]

Sixth Conclusion: The state has, since 1936, tried to provide industrial employment for white workers.[48]

Seventh Conclusion: The same effort has not been made to provide jobs for Negroes.[49]

Mississippi has, then, created a Negro society composed, to a large degree, of non-producers.

Eighth Conclusion: Were state and community leaders willing, jobs could be obtained for Negro workers, for:

(1) there is a continuing supply of such workers,[50]

(2) area Industrial Development leaders claim to be inhibited by lack of available labor,[51] and,

(3) such leaders have been actively barred from promising efforts to secure such jobs.[52]

Most Mississippi Industrial Development personnel feel that the State has gone as far as is practical (if not too far) in securing just any job for white workers.[53] The key phrase in promotion of industrial inducement efforts is no longer "un-employment." This, apparently, is an easier problem to cope with than is "under-employment." It's easier to "take what you can get" than it is to "get what you want." Leaders is most areas of the state feel that they can afford now to be choosy in

[47] *See* figures 1 and 2.

[48] Miss. Laws 1st Ex. Sess. 1936, ch. 1; now MISS. CODE ANN. § 8936 (Supp. 1966).

[49] Interviews with Mr. Oliver Emerich, Editor, The McComb Enterprise Journal, in McComb, Mississippi, July 13, 1966; Mr. Griffen Norquist, County Attorney, Yazoo County, Mississippi, in Yazoo City, Mississippi, July 1, 1966.

[50] *See* Tables 2 and 3.

[51] Interview with Mr. W. D. Bailey, Executive Vice-President of the Pascagoula Chamber of Commerce, in Pascagoula, Mississippi, July 18, 1966; and with others in similar positions across the state.

[52] Interview with Mr. Oliver Emerich, Editor, The McComb Enterprise-Journal, in McComb, Mississippi, July 13, 1966.

[53] Interview with Mr. Thomas P. Palmer, Executive Vice-President of the Meridian Industrial and Commercial Foundation, in Meridian, Mississippi, July 21, 1966.

what they get.[54] Yet, little or nothing is being done to "get" anything for Mississippi's Negro citizen.

Therefore, among the Negro citizens even more than among white, the non-productive to productive ratio continues to rise. Per capita income is retarded. More "support money" is necessary. The problem of stopping this economic slide grows more expensive daily, and daily there are fewer dollars available.

The problems presented by this out-migration of productive citizens, especially Negro productive citizens, will not be solved until the state recognizes it exists. This does not appear to be the case at present.[55] Too many white Mississippians view out-migration of Mississippi Negroes as a diminution of the state's "race problem."[56] Instead, it might well prove the source of the ultimate "race problem" facing the State. Reason insists that a black society in an artificially created state of indigency will not long continue in peaceful co-existence with a prosperous white society.

Once the economic ramifications of present policy is understood, the lack of rationale of such policy should be evident. In an economic system success breeds success. Jobs create jobs. For every manufacturer there must be support industries, transportation, utilities, sales, etc. From every pay check dollar there is created markets for food, clothes, and entertainment.

If a policy of denying jobs can produce a "snowballing" effect on economic losses, so can a policy of providing jobs result in a "snowball" of economic strength.

The economic position of Mississippi is such that it simply cannot afford a system of prejudices that continues to plunge it further into economic privation. The Mississippi Economic Council's study of the effect of the state's racial climate on industrialization is indicative of the detrimental effect of these prejudices on everyone's job.[57]

If we can't make the black Mississippian an equal citizen as morality, law, and common sense demand, we had better start thinking of aiding him in becoming a productive citizen, or we shall find ourselves sitting on our prejudices looking out at the rest of the nation's prosperity.

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[54] Interview with Mr. W. D. Bailey, Executive Vice-President of the Pascagoula Chamber of Commerce, in Pascagoula, Mississippi, July 18, 1966.

[55] See magazine interview with Governor Barnett. *The Negro's Future in the South*, U. S. NEWS & WORLD REPORT, June 3, 1963, p. 60.

[56] Interview with Mr. Griffen Norquist, County Attorney, Yazoo County, Mississippi, in Yazoo City, Mississippi, July 1, 1966.

[57] Mississippi Economic Council, *Confidential Survey on Industrial Location Factors* (1965).

STUDENT COMMENTS

TAXATION—CHARITABLE CONTRIBUTIONS: CURRENT PROBLEM AREAS

Ever since Congress first allowed taxpayers a deduction for charitable contributions in 1917, there has been continuous controversy between the Commissioner of Internal Revenue and individual taxpayers over such subjects as the kinds of contributions which will qualify, the organizations to which they may be made, and the manner of valuing contributions of property. The Commissioner, being charged with the responsibility of collecting revenue, has understandably tried to limit such deductions as much as possible while still remaining within the bounds of the statutes and his interpretation thereof. Taxpayers, on the other hand, have attempted to avail themselves of allowable charitable deductions by a myriad of methods, not all of which have been consistent with the letter or the spirit of the Code. It appears that taxpayers will take advantage of every benefit intentionally granted by Congress as well as exploit unintended loopholes in the statutes, regulations, administrative interpretations, and judicial decisions. The courts, until Congress acts to change or clarify its position in respect to these statutes, are charged with the responsibility of determining what favorable charitable contribution deduction practices will be permitted taxpayers and of prohibiting those they consider inconsistent with the existing laws.

It is a truism that charities are the darlings of Congress and frequently of the courts. Donations to charities are considered to be in the public interest, and it was to encourage such contributions that Congress originally decided to subsidize charities by making them deductible for income tax purposes.[1]

Perhaps the best example of Congress' intention and attitude regarding charitable deductions came from the 75th Congress. The Treasury Department attempted to include in the Revenue Act of 1938 a provision which would have limited the deduction allowed for donations of property other than money. The proposed provision was explained as follows:

> If a charitable contribution is made in property other than money, the donor is permitted to deduct the value of the property at the time of the gift, and is not limited to the cost of the property to him. It is, therefore, to the donor's advantage to

[1] *See e.g.*, 55 Cong. Rec. 6728-6729 (1917) (remarks of Senator Hollis).

> make contributions in securities or other property which has appreciated in value and in this way avoid tax upon the unrealized capital gain. There is no justification in principle for the allowance of a deduction for the amount of the unrealized appreciation which has never been included in taxable income. The bill accordingly provides that in the case of a contribution or gift made in property other than money the allowable deduction shall be limited to the adjusted basis of the property (as provided in section 113) in the hands of the donor or the fair market value of the property at the time of the contribution or gift, whichever is the lower.[2]

The Senate Finance Committee refused to accept the proposal, however, and struck the provision from the act. It stated its reasons as follows:

> Representations were made to the committee by officials of educational and charitable institutions that the effect of such a provision would be to discourage the making of charitable gifts in kind. The committee believes that charitable gifts generally ought to be encouraged and so has eliminated this provision of the House bill.[3]

Realizing Congress' intent to encourage charitable contributions the courts have generally been liberal in construing the statute allowing deductions therefor. Often, however, problem areas arise in which it is not clear whether the intent of Congress should be applied to the extent of encouraging the practices involved. The benefits which would obtain to charities must be balanced against the revenue loss which would be incurred by permitting such practices. This paper will explore the Commissioner's efforts to prohibit recent taxpayer attempts in several areas and examine the treatment the courts have given the ensuing conflicts.

I. Use of Property

Occasionally taxpayers have desired to make a charitable contribution but have not wanted to give up permanently any of their property. They have resorted to granting a qualifying organization the rent-free use of either realty or personalty and have attempted to take a deduction for the property's fair rental value. Thus the question arose as to whether this type contribution should be deductible. The Commissioner first publicly stated his position by publishing I.T. 3918.[4] It held that taxpayers could not deduct the value of the use and oc-

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[2] H.R. Rep. No. 1860, 75th Cong., 3d Sess. (1938).

[3] S. Rep. No. 1567, 75th Cong., 3d Sess. 14 (1938); 1939-1 (Part 2) Cum. Bull. 789.

[4] 1948-2 Cum. Bull. 33.

cupancy of property donated to charities. In light of the section 170 dictum that charitable contributions, "payment" of which are made in the taxable year, are deductible, the I.T. reasoned:

> . . . permission to use and occupy property . . . does not represent a *payment* made to or for the use of the organization . . . Such an arrangement does not constitute a gift of property. It is merely the granting of a privilege for which no charge is made.[5]

The first case on this point was *Priscilla M. Sullivan.*[6] In this case the taxpayer owned property which she caused to be conveyed to the Red Cross in 1942. By the terms of the deed the property would revert to the grantor at the conclusion of World War II or when it ceased to be used by the Red Cross as its local headquarters, whichever event should occur first. She then claimed deductions for charitable contributions in 1942 and 1943 for the rental value of the property. The Commissioner disallowed the deductions. The Tax Court ruled that a valid gift of property had been made to the Red Cross in the form of a determinable fee and that the taxpayer was entitled to a deduction in the year it was made (within the percentage limitations imposed by the Code) of the fair market value of the gift. The court, however, rejected the taxpayer's contention that she had made a series of annual gifts measured by the rental value of the property for each year.

The Tax Court again rejected the Commissioner's arguments in *Mattie Fair.*[7] In that case the taxpayer, who owned a two-story building, conveyed to a qualified charity, without consideration, the perpetual right to build, own, and maintain five additional stories on its building plus the rights of access and support. If the building were destroyed, the taxpayer was not obligated to rebuild, but, if he did, the charity would also have the right to rebuild. The charity did actually construct and use the additional five stories. The taxpayer claimed a charitable contribution in the amount of $70,000 and attempted to deduct that amount in 1948. The Commissioner took the position that the rights and interests conveyed by the taxpayer did not constitute "property," but were merely a license, or, at most, an easement, since no interest in the ground was donated. Thus, they could not be the subject of a charitable contribution under the regulations allowing deductions for money or property. Consequently, the deductions was disallowed. The Tax Court, however, ruled for the taxpayer and allowed the deduction. It reasoned that property is the sum of all the rights and powers incident to ownership and that the right to use the airspace is one of these

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[5] *Id.*

[6] 16 T.C. 228 (1951), *acquiesced in,* 1951-1 CUM. BULL. 3.

[7] 27 T.C. 866 (1957), *acquiesced in,* 1957-2 CUM. BULL. 4.

rights in land. The conveyance thus granted the charitable organization a present irrevocable interest in the property. The court, holding that the issue was not properly before it, refused to rule on the Commissioner's alternative contention that if the conveyance did constitute a gift, then the taxpayer's basis in the property should be reduced by the value of that gift.

Though I.T. 3918 was not specifically mentioned in either *Sullivan* or *Fair*, the Commissioner's position in each case was obviously an application of the reasoning therein. In neither case, however, did the court actually reach the precise factual situation upon which I.T. 3918 was based—the grant of a mere right to use and occupy property. The court in both *Sullivan* and *Fair* found that a present interest in the property itself had been given.

Though the Commissioner acquiesced in both of the above cases, I.T. 3918 was never revoked. However, the next case on this point, *Jack M. Passailaique*,[8] extinguished whatever vitality it may have still possessed. The taxpayer therein leased property he owned to a qualified charity, rent-free. The lease agreement provided that the charity would use the property solely for charitable purposes and would pay no rent, that the lease would run for an indefinite period of time, and that the charity would have to vacate on fifteen days' notice. The charity occupied the property under this lease for the next two years. The taxpayer deducted his estimation of the property's fair rental value as a charitable contribution, and this deduction was disallowed by the Commissioner.

Here, then, appeared to be a perfect factual situation in which to test I.T. 3918, and the Commissioner employed its reasoning. He argued that the taxpayer did not give up the title to his property but rather granted the use and enjoyment of the property by lease, thus, no gift was made. It was merely the granting of a privilege.

The court, discussing I.T. 3918, *Sullivan*, and *Fair*, ruled that there had been a valid charitable contribution and that the deduction should have been allowed. It reasoned that:

> "Property" is more than just the physical thing . . . it is also the sum of the rights and powers incident to ownership of the physical thing. . . . Property is composed of constituent elements and of these elements the right to *use* the physical thing to the exclusion of others is the most essential and beneficial. Without this right all other elements would be of little value, for if the owner is deprived of the use of the tangible thing, little more than the barren title is left in his hands.[9]

Further, pointing out that the form of the legal writing used to convey the property is unimportant, the court said:

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[8] 224 F. Supp. 682 (D. Ga. 1963).

[9] *Id.* at 686.

> It is not the *form* of the transaction, but rather the *substance* of what was accomplished that is important, and in Sullivan, Fair and in this case there was a transfer of a valuable right to use the subject property.[10]

Using this reasoning the court dismissed as unimportant the fact that the taxpayer had the right to terminate the lease on fifteen days notice. It pointed out that in this case, as well as in *Sullivan* and *Fair*, the important question was not whether the right granted *might* have been terminated, but rather, whether the right *was* terminated. The court concluded by saying:

> It is our view that in the Sullivan case the Tax Court clearly overruled the Commissioner's ruling in 3918 and in so doing the court carried out the broad intent of Congress to encourage charitable contributions and of liberally construing the charitable donations provisions of the Revenue Code.[11]

Thus the Commissioner has lost every battle in this area. *Sullivan* and *Fair* clearly establish that any donated interest in property may be the subject of a charitable contribution, and *Passailaique* would seem to indicate that the courts will be very liberal in determining what constitutes an interest in property.

Passailaique, however, leaves several questions unanswered. The court, using a pragmatic approach, held that the taxpayer's right to terminate the lease upon fifteen days notice was unimportant since that right was not exercised. Would it have been as quick to find that a property interest had been donated if the taxpayer had ordered the charity to vacate after a month or two? And what if the charity had never actually occupied and used the property? Would the court have held that the donation of a right which was never exercised was a valid contribution? Or what if, instead of a fifteen day notice of termination, the taxpayer had retained the right to cancel the lease at any time without notice? If deductions are allowed in such circumstances, taxpayers will have an enormous loophole. Any property owner who finds that he is temporarily unable to rent his property could gain a charitable deduction without any desire or intent to benefit a charity merely by granting the use of his property to that charity subject to any conditions he might choose.[12] Surely this was not the intent of Congress,

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[10] *Id.*

[11] *Id.* at 687.

[12] Landlords know from experience what percent of their property shall be unrented annually. They can thus grant a charity the use of this percentage without any loss of rental revenues.

yet one interpretation of *Passailaique* would seem to indicate at least a trend in this direction.[13]

And what effect might the *Passailaique* case have on donations of the use of personal property? Here the Commissioner has had a great deal more success than in the real property field. In Rev. Rul. 58-279[14] the taxpayer was a pilot who performed various gratuitous services for a qualified charity using his own aircraft, automobile, and other equipment. While the Commissioner readily granted a deduction for the taxpayer's unreimbursed out-of-pocket expenses directly attributable to his charity work,[15] no deduction was allowed for a proportionate share of the general maintenance or the general repairs of the articles involved. The ruling specifically pointed out that no deduction was to be allowed for the fair rental value of a taxpayer's personal property used for charitable purposes.

The Commissioner's position was upheld in *Orr v. United States*[16] The taxpayer served on several boards and committees of the Methodist Church. In connection with these activities he used his own automobile and airplane for which he attempted to deduct depreciation, insurance, and repair expenses as a charitable contribution. The Commissioner disallowed deductions for these items and the court ruled this disallowance was proper. With regard to depreciation the court ruled that it was bound by the "plain, prosaic language of the statue"[17] and that depreciation was not a payment to a charity as required by section 170. In regard to the insurance and repairs expense the court held that such deductions would be allowable if the expenses were caused by the use of the vehicles for charitable purposes, but since there had been no showing to that effect, the deduction could not be allowed here. The taxpayer also argued that he was entitled to a deduction in the amount of the fair rental value of his vehicles for the length of time he used them for charitable purposes. Holding that the real property cases were distinguished because in them "the charitable organization took possession and had exclusive control of the property," while in the present case "the vehicles remained under the taxpayer's control at all times," the court ruled in favor of the Commissioner.[18]

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[13] The propriety of another practice will also have to be considered. Should a taxpayer who contributes the use of a store building to a charity on a monthly basis be permitted a depreciation deduction since the store is no longer used in trade or business? This problem should also be considered with regard to double deductions to be discussed later.

[14] 1958-1 CUM. BULL. 145.

[15] Such deductions are specifically allowed by regulations. Treas. Reg. § 1.170-2(a)(2).

[16] 343 F.2d 553 (5th Cir. 1965)

[17] *Id.* at 556.

[18] *Id.* at 555.

Orr would seem to leave open the possibility of a better informed taxpayer obtaining a deduction for a donation of the use of personal property. As has been pointed out,[19] a taxpayer could grant a charity the exclusive use of property such as automobiles, art objects, etc. for a period of time under rent-free leases. According to *Passailaique* a lease is a valid interest in property, and if the charity was granted its exclusive use during the prescribed period, the *Orr* decision would not seem to be applicable.

As pointed out in *Passailaique,* the substance, not the form, of the transaction should be controlling. A legislative label as to whether a donation is personalty or realty should not be decisive. Donations of the use of both real and personal property should be allowed in cases where a property interest is transferred. Limitations must be utilized, however, to prevent abuse.

II. Services

For forty-eight years it has been held that the value of services rendered a charitable organization is not allowable as a charitable contribution deduction. This position originated with T.D. 712,[20] which held specifically that contributions under section 170 had been construed to mean gifts of money or property and that the value of services did not qualify as either. Consequently, the Regulations provide concisely that "[n]o deduction is allowable for contribution of services."[21] The service reiterated its position in 1951 when it ruled that a carpenter who donated his time to a local Civil Defense organization to build observation posts could not deduct the value of such time as a charitable contribution.[22] This ruling appears to be the only reported challenge to the Commissioner's position where the contribution claimed was for the value of pure services.

The Commissioner has been challenged, however, in cases where the contribution arguably could be classified as property rather than services. For example, a newspaper which gratuitously published advertisements for charitable organizations attempted to deduct the value of such advertisements. The Commissioner ruled, however, that the newspaper, rather than donating property, was merely rendering a service and thus disallowed the deduction.[23] A taxpayer who sought to deduct the value of his blood furnished for a transfusion was similarly rebuffed. "[A]llowable deductions are confined to donations of money and of

[19] 20 J. Taxation 178 (1964).
[20] 3 Cum. Bull. 188 (1920).
[21] Treas. Reg. § 1.170-2(a)(2) (1958).
[22] *Special Ruling,* Oct. 8, 1951; 525 CCH, par. 6125 (1952).
[23] Rev. Rul. 462, 1957-2 Cum. Bull. 157.

things which are generally thought of as being comprehended by the term 'property'," the Commissioner ruled, and "furnishing blood for a transfusion or to a blood bank is more analogous to the rendering of a personal service by the donor rather than a contribution of 'property'. . . ."[24] The basis of this revenue ruling was not that blood isn't property. If one purchased blood and then donated it to a charity, he would undoubtedly be allowed a deduction for a donation of tangible personal property. The ruling, however, held that where the blood is donated by the person whose body created it, such a contribution is more analogous to one of services.

The problem in this area have come from attempted deductions for contributions of mixed property, the value of which results almost exclusively from the personal services of the donor. For example, an artist might attempt to deduct the fair market value of one of his paintings donated to charity. In such a case the artist would be receiving a deduction for the value of his services since the cost of physical materials used in the painting would be negligible.

Surprisingly, the Commissioner's only argument in such cases has been on the question of valuation. In *Hilla Rebay*[25] the taxpayer gave non-objective paintings created by her to charitable organizations and claimed deductions totaling $169,000 over a five-year period. The Commissioner would agree to only a $7,000 figure as the fair market value of the paintings. The Tax Court, relying heavily on the fact that the taxpayer had only sold one painting in her lifetime, and that under circumstances causing the court to doubt its value for appraisal purposes and the testimony of the appraisers, ruled that the paintings had a fair market value of $9,300. In *William and Catherine Fox*[26] taxpayer was a chemist for the New York Police Department. He had received a Ph.D. degree in chemistry and for years had carried on fundamental research in the physical sciences. He attempted to deduct his estimation of the fair market value of an article written by him and donated to a scientific journal. The Tax Court, conceding that the article might well represent a valuable contribution to scientific knowledge, pointed out that petitioner did not offer proof either that his contribution came within the limits of those allowed by section 170 or of the fair market value of the article, and disallowed the deduction. In *Charles J. Kuderna*[27] the taxpayer, a commercial artist, donated to the United States Air Force one of his paintings which he valued at $2,500. The Tax Court, pointing out that petitioner's expert witnesses substantiated his valuation

[24] Rev. Rul. 162, 1953-2 CUM. BULL. 128.
[25] T.C. Memo 1963-42.
[26] T.C. Memo 1963-247.
[27] T.C. Memo 1965-143.

of the painting while the Commissioner offered no experts, upheld the deductbility of the amount claimed by the taxpayer.

Thus the Commissioner has chosen not to argue the seemingly most crucial issue in these cases—whether such donations are deductible at all. Whether he has decided to concede the deductibility of such property or is merely waiting to present a frontal assault remains to be seen.

Certainly a good argument could be made against the deductibility of such property both on the basis of policy and of Congressional intent. It might be urged that a donation's character be based on a determination of what gives the article its value. If the services of the donor have given the article nearly its entire value, then a donation of such an article would be deemed essentially a donation of services. Deductions would be allowed only for the value of the physical materials used to produce such "mixed" property. Thus an artist would be allowed a deduction for the value of paint and canvas used, but not for the value of his services. By use of such reasoning only token deductions would have been allowed in *Rebay*, *Fox*, and *Kuderna*. This would operate to place all donors on an equal basis. As things now stand, taxpayers who possess talents convertible into some form of property enjoy a great advantage. For example, an artist would enjoy a great advantage over a physician. The possibilities for such deductions might be inexhaustible. *Rebay* and *Kuderna* indicate an artist may deduct the value of his paintings donated to charity. Thus artists such as Picasso, the market value of whose paintings are substantial and easily proven, might create deductions at practically no cost to themselves. Or an author might donate a book or play to a charity and deduct its fair market value. A singer might cut a master record and donate it. The charity could sell it or receive the royalties, and the singer could gain a deduction in the amount of the fair market value of the record. A movie star might spend a day making a short picture for the Heart Fund or some similar charity and deduct its fair market value if he owns the film. And such reasoning might also be employed in favor of those who make their living advising others. They would merely have to reduce their advice to writing (thus rendering it technically "property") to gain a deduction. Thus a land planner could deduct the value of his recommendations to a university or a security analyst might donate his advice to a college endowment fund. In all these cases the benefits to the talented donor are obvious. For practically no out-of-pocket expense, he might obtain a substantial charitable deduction. And the value of the property donated would never be taken into his income and taxed to him. The demand for his services would be the only limiting factor. After several years he might even qualify for the unlimited charitable deduction allowed by section 170(b)(1)(c) and thereafter

pay no tax whatsoever. While the Commissioner might possibly defeat such deductions on other grounds, these examples are illustrative of the possibilities available to taxpayers possessing such talents.

The Commissioner could also argue that Congress intended that property resulting primarily from personal services be treated as services rather than property. This argument could be advanced by drawing an analogy to Congress' treatment of such property in the capital gains field.

In section 210(a(c) of the Revenue Act of 1950, now found in section 1221(3) of the 1954 Code, Congress specifically excluded from the definition of capital assets such items as copyrights, literary, musical, artistic compositions or similar property. The language of the committee reports illustrates their reasoning in excluding such items. For example, the Ways and Means Committee Report states:

> The definition of the term 'capital asset' has been amended so as to specifically exclude . . . copyrights; . . . designs, literary, musical, or artistic . . . property in the hands of either the person whose *personal efforts created such property* or a person deriving a basis for the property, for the purposes of determining gain, from the *person who created it.*[28] (emphasis added)

The report further points out that:

> The amendment will also exclude from such category any property similar to that specifically named; for example, a formula or a radio program which has been *created by the personal efforts of the taxpayer.*[29] (emphasis added)

And the Finance Committee Report states:

> If an amateur receives royalties on his book or other artistic work, they are treated as ordinary income, but if he holds his book or other artistic work for 6 months . . . and then sells it outright *he can avail himself of a loophole* which treats such sales as the sale of a capital asset. . . . As a result the taxpayer receives long term capital gain on the *product of his personal effort.*[30] (emphasis added)

Thus Congress chose not to treat such articles as "property" for tax purposes in the capital gains area. Could not the Commissioner urge that Congress also intended to deny taxpayers a similar loophole in the charitable contributions field?

There is also reason for believing such arguments would be successful in the courts. In *Wilkinson v. United States*[31] the Court of Claims

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[28] H.R. Rep. No. 2319, 81st Cong., 2d Sess. 91 (1950).

[29] *Id.* at 92.

[30] S. Rep. No. 2375, 81st Cong., 2d Sess. 43 (1950).

[31] 157 Ct. Cl. 847, 304 F. 2d 469 (1962).

held that the taxpayer had to include in his income the value of a contract right to receive income which he purchased and later donated to charity. Proceeds of the contract right (the contract being one to receive a contingent fee for personal services) would have been ordinary income to the assignor and so it is to the assignee-taxpayer to the extent of the latter's economic gain on the right. The court pointed out that:

> It is true that contract rights are generically deemed property rights. Whether they are "property' for tax purposes, however, may be another matter. As this court stated in *Arnfield v. United States,* 143 Ct. Cl. 277, 287, Cert. den. 359 U.S. 943, "the concept of 'property' is not necessarily controlling in matters of taxation."[32]

The court went on to say:

> Were we to hold otherwise, we can visualize countless opportunities for individuals performing personal services to exploit this method of limiting their tax responsibilities. . . . True it is not the function of courts to legislate in an effort to close tax loopholes, but certainly it is not the function of courts to create the loopholes which is what we would be doing if we acceded to taxpayer's contention.[33]

It is true, however, that the Congressional history discussed and the *Wilkinson* case both dealt with the definition of a capital asset, a subject that has been narrowly construed by the courts,[34] and that charitable contributions provisions have been liberally construed in favor of such contributions. In light of this there can be no assurance that the Commissioner would be successful if he did adopt such a position in argument. But in view of the enormity of the loophole developing and its resultant effect on tax revenues, it would not be at all surprising to see him try a direct attack on such deductions.

III. Crop Shares

Another current problem area involves the treatment to be accorded owners of farmland who donate crop shares received from their tenant farmers. Two cases with nearly identical facts have been decided recently—and diametrically opposite results have been reached. In both these cases the Commissioner conceded the deductibility of the donated crop shares as a charitable contribution but contested the right of the taxpayers to exclude the fair market value of those shares from gross income.

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[32] *Id.* at 886.
[33] *Id.* at 887.
[34] *Id.* at 856.

A brief recap of the tax treatment of such property might be beneficial to an understanding of the problem. In I.T. 3910[35] the Commissioner originally held that a gift of crops (which had a zero basis in the hands of the donor-farmer) causes realization of income by the donor-farmer in the amount of the fair market value of the crops. I.T. 3932[36] held the same thing with respect to a gift of livestock. The cases of *White v. Broderick*[37] and *Campbell v. Prothro*,[38] however, overruled the Commissioner's position and held that such contributions did not result in a realization of income to the donor. The Commissioner, then, revoked his former rulings.[39] Since that time it has been established that farmers could obtain charitable contribution deductions for gifts of farm produce without realizing income with respect to the property donated. The only condition placed on such deductions was that the amount of the contribution be reduced by the expenses allocable to the production of the donated property.[40]

In *Peterson v. United States*[41] the taxpayer donated part of his share of grain raised by his sharecrop tenant. The grain was kept in the tenant's farm storage. No warehouse receipts were issued. When the taxpayer desired to make a gift he would inform the tenant to deliver a specified number of bushels of grain to the donee. At the direction of the donee the grain would be shipped. The court, without discussion, ruled that the taxpayer did not realize income by donating the grain to charity.[42]

In *Clyde G. Tatum*[43] taxpayers donated some of their portion of grain and cotton raised by their sharecrop tenants by transferring negotiable warehouse receipts and cotton classing cards to the donee charities. The court, specifically declining to follow *Peterson*, held that the taxpayers realized income by making the donation and required them to include in their gross income the amounts of cash received by the charities when they sold the donated crops. One judge dissented in favor of the taxpayers.

The key question in these cases should be whether the crop shares in the hands of the landlord are to be considered rent or property de-

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[35] 1948-1 CUM. BULL. 15.

[36] 1948-2 CUM. BULL. 7.

[37] 104 F. Supp. 213 (D. Kan. 1952).

[38] 209 F.2d 331 (5th Cir. 1954).

[39] I.T. 3910 was revoked by Rev. Rul. 138, 1955-1 CUM. BULL. 223; and I.T. 3932 was revoked by Rev. Rul. 531, 1955-2 CUM. BULL. 520.

[40] Rev. Rul. 531, 1955-2 CUM. BULL. 520.

[41] 16 Am. Fed. Tax R. 2d 5761 (E. D. Wash. 1965).

[42] It should be observed that decisions of this type, where the basis of the decision is lacking, have little precedential value and are useless to the Commissioner in administration of the revenue laws.

[43] 46 T.C. 736 (1966).

rived from his own farming operations. If they are classified as rent, then donations of them amount to assignments of income, which must be included in the donor's gross income under the established precedents.[44] If they are considered property derived from farming, however, then their donation would not amount to a realization of income under the doctrine of *White v. Broderick* and *Campbell v. Prothro.*

This is a close question, which conceivably could go either way. A recent case, *Myra Foundation v. United States,*[45] involving a different section of the Code indicates that such property should generally be classified as rent. In that case a tax-exempt private foundation owned farm land from which it received crop shares under substantially the same terms as in *Peterson* and *Tatum.* The question involved was whether the crop shares constituted a share of the profits realized from the farming operations and were thus taxable to the foundation as unrelated business income under section 511, or whether they were rent and thus excludable under section 512(b)(3). The court pointed out that the owner of the farm land and the operator may enter any sort of agreement they choose—they may create a landlord-tenant relationship or a partnership or joint venture relationship. In the present case the contract appeared to clearly reflect the intention of the parties to create a landlord-tenant relationship. Thus the crop shares, the court held, should be considered rent. In an older case, *Ralph Romine,*[46] the Tax Court indicated it felt such crop shares should be considered rent, although it pointed out that this determination had no bearing on its decision in the instant case. This case involved a determination of the basis of grain used to feed livestock. The taxpayer sought a deduction for the value of the grain so used which he had received as a gift. The court pointed out that the donor's basis was zero whether the crop shares were considered rent or income from their own use of the land, since the grain was never sold. This case, then, is not much help in deciding the present issue.

In favor of the view that the crop shares should be considered property derived from the owner's use of the land, the taxpayer in *Tatum* argued that sharecrop landlords are considered farmers under all the applicable provisions of the Code and the regulations thereunder.[47] Thus there is no logical reason to draw a distinction between the crops in the hands of the sharecrop landlords and in the hands of the sharecrop tenant. Both represent the fruits of their farming opera-

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[44] Helvering v. Horst, 311 U.S. 112 (1940).

[45] 382 F.2d 107 (1967).

[46] 25 T.C. 859 (1956).

[47] *E.g.,* INTERNAL REVENUE CODE OF 1954, sections 175(c)(2), 182(c)(2), and 180(b); Treas. Reg. §§ 1.61-4(d) and 1.6073-1(b).

tions. If sharecrops tenants are allowed to donate such crops without realizing income, then certainly it was the intent of Congress that sharecrop landlords be allowed to do the same.

The *Tatum* case is currently on appeal to the Fifth Circuit, and it would seem possible that this issue will eventually reach the Supreme Court. Its final determination, at any rate, may rest on policy considerations. Would the benefits to charities outweigh the revenue loss incurred? It should be pointed out, however, that even should it become uniformly established that crop shares generally constitute rent, *Myra Foundation* would seem to point out the way to avoid such a determination for informed taxpayers. Merely have the farming agreement set up in the form of a joint venture or partnership. Thus the landowner's portion of the crops would be property derived from farming and he could give it away without being required to realize income.

IV. Double Deductions

Double deductions are uniformly condemned by the Code and Regulations. Section 642 of the Code specifically states that amounts allowable under sections 2053 or 2054 as deductions in computing the taxable estate of a decedent are not to be allowed as a deduction in computing the taxable income of the estate or any other person, unless such amounts are disallowed under sections 2053 and 2054. And Regulations sections 1.161-1 and 1.212-1(o) specify that:

> Double deductions are not permitted. Amounts deducted under one provision of the Internal Revenue Code of 1954 cannot again be deducted under any other provision thereof.[48]

This prohibition would seem to encompass both attempts to utilize a single expenditure to take a deduction under two different provisions of the Code in the same tax year and attempts to accomplish the same thing in different years by deducting a single expense item under one section in one year and the same expense item under another section in a later year.

While there is no specific recitation of this statement in section 170 or the regulations thereunder, it appears that double deductions were not meant to be allowed with respect to charitable contributions either. In this regard section 170(e) requires that the amount of a donation to charity must be reduced by the amount of depreciation deductions previously taken with respect to such property. And the Regulations, section 1.170-1(c), concerning donations of inventory property require that the costs of producing or acquiring such property be deducted from

[48] Treas. Reg. §§ 1.161-1 (1958) and 1.212-1(o) (1957).

the cost of goods sold in determining the business' tax liability for that year. The obvious intent was to prohibit double deductions with regard to such donations. A recent case and a long-standing revenue ruling, however, indicate that other double deductions may be countenanced in this area.

In *Goldman v. Commissioner*[49] the taxpayer claimed a charitable contribution deduction in part for medical journals he had donated to charity. He had received a great many of these journals because of his membership in the American Medical Association, and their subscription price was included in his dues. Such dues are deductible to doctors either as charitable contributions or business expenses, and the court noted in a footnote that while the record did not show that Goldman took such deductions in the years he received the journals, "he probably did, for his 1961 return shows a deduction 'dues, subscriptions $800.22'."[50] At any rate he was not required to reduce the value of the donated journals by the cost of subscription prices (dues) previously taken as deductions. Thus it would appear that the taxpayer was allowed a double deduction. He deducted the cost of subscriptions to the journals (which were included in his A.M.A. dues) in the year paid, and then deducted the value of those journals again in the year he later donated them to charity.

Revenue Ruling 59-196[51] also indicates a willingness to allow double deductions with respect to charitable contributions. That ruling provides that a charitable contributions deduction will be permitted for the full fair market value of a contributed oil lease and that no reduction need be made for the drilling and development costs attributable to such leases which had been deducted in earlier years. This ruling was premised on the "long standing interpretation of the Internal Revenue Service that the full fair market value without adjustment for deductions, such as depreciation, shall be allowed as a charitable contribution. . . ."[52] Since the enactment of section 170(e) it appears evident that the basis of this "long standing interpretation" no longer exists.

The allowance of double deductions would seem to be an unnecessary extension of the policy of encouraging gifts to charities. In view of the other benefits available to donors, disallowing such deductions would not appear to deter charitable giving, and it would bring about uniformity in enforcement of the Code. Even though section 642 is the only Code provision disallowing double deductions, it would seem possible that such deductions could be defeated in the courts. To

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[49] 46 T.C. 136 (1966).

[50] *Id.* at 138, n. 2.

[51] 1959-1 CUM. BULL. 56.

[52] *Id.* at 57.

clarify and strengthen his position, however, the Commissioner should revoke Revenue Ruling 59-196 by issuing another ruling specifically stating that double deductions in connection with charitable contributions will not be allowed.

V. Valuation

The final area of recent controversy to be considered involves a determination of the fair market value of donated property. Specifically, it involves the weight to be accorded the prices realized at auction sales of the property shortly after its donation in determining the property's fair market value.

Fair market value is a question of fact to be decided by the trial court.[53] The Regulations, attempting to spell out a guide for the determination of such value, provide:

> If a contribution is made in property other than money, the amount of the deduction is determined by the fair market value of the property at the time of the contribution. The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts.[54]

The courts, however, have not given uniform weight to the auction sale prices of donated property in their determinations of its fair market value. Two recent cases involving donations to the same charitable organization illustrate the present diversity in the holdings.

In both of these cases contributions of used personal property were made to a hospital. The hospital, which desired cash for one of its projects, had encouraged such gifts and had arranged for a local auction house to appraise the goods for the donors and then sell them at unrestricted auctions, remitting the amounts realized after deductions for sales commissions, to the hospital.

In *Philip Kaplan*[55] the donated property was composed principally of used household furnishings and clothing. The president of the auction company appraised these articles at $5,550, which amount the taxpayer claimed as a charitable contribution. Substantially all these articles were sold by the auction company within two months for an aggregate price of $459.50. The Commissioner allowed $467.50 as the total value of all the contributed property.

The tax court substantially upheld the Commissioner's determina-

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[53] Tripp v. Commissioner, 337 F.2d 432 (7th Cir. 1964).

[54] Treas. Reg. § 1.170(1)(c) (1958). Special rules apply to inventory property.

[55] 43 T.C. 663 (1965).

tion of the property's fair market value. It declined to accord any probative value whatsoever to the auction company's appraisals of the property and said that "the most persuasive evidence"[56] of the articles' value was the prices realized at the auctions. Allowing $40.50 for the articles not sold at auction, it arrived at a total valuation of $500.

In *Daniel S. McGuire*[57] the contributed property included rare books, china, silverware, furniture, furs, and other such items. The same appraiser involved in *Kaplan* appraised the donated articles at $62,073, which amount the taxpayer claimed as charitable deductions in the three years over which the gifts were spread. The great majority of this property was sold by the auction company, again at unrestricted auctions, for a total of $6,619.09. The Commissioner allowed only this amount as a charitable contribution. In this case, however, the Tax Court ruled that the prices received at auction were not conclusive as to fair market value and gave some weight to the appraisals. It pointed out that unrestricted auction sales require that all the property be sold to the highest bidder, with no minimum bid price nor minimum number of bids being required. Prices received at such forced sales are not unnecessarily the best criterion of value. The articles might bring quite different prices if neither the buyer nor the seller were under any compulsion to consummate the deal. Thus, the court considered other testimony, including the opinion of the appraiser, that such property would under normal circumstances in a retail market bring between 30 and 50 percent of the appraisal figures. It arrived at the amount of $15,200 as the fair market value of the contribution.

These two cases appear inconsistent. The same appraiser was involved in both, and in one his appraisal was declared "a sham" devoid of probative value, while in the other it was deemed worthy of consideration. The court in *McGuire* drew a distinction by pointing out that in *Kaplan* the appraisals were the only evidence offered as to value. It considered other evidence on this point, however, including the donor's testimony of their cost and the appraiser's testimony that the articles should bring between 30 and 50 percent of their appraised value in a normal market.

It is contended that *McGuire* is the correct approach. Forced sales such as the auctions in these cases should not be conclusive as to "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell. . . ."[58] While truly "sham" appraisals made only for tax purposes should be thrown out, good faith appraisals can be helpful to a court

[56] *Id.* at 666.
[57] 44 T.C. 801 (1965).
[58] Treas. Reg. § 1.170(1)(c) (1958).

in arriving at the property's fair market value. Such appraisals would be consistent with the recent Rev. Proc. 66-49.[59] They should not only be allowed, but encouraged.

VI. Conclusion

Further litigation is to be expected involving each of the areas discussed above. To reiterate, in each case the court should balance the benefits charities would derive against the revenue loss that would result if the contested practice were allowed. In addition, of course, the court should determine if the practice is within the letter and spirit of section 170. By thoroughly considering these factors, courts may reach intelligent and, hopefully, more consistent results in cases involving charitable contributions.

Charles Robert Butterfield

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[59] 1966-2 Cum. Bull. 1257.

TAXATION—LEASING OF CATTLE: CONVERSION OF ORDINARY INCOME TO CAPITAL GAINS[1]

In an agricultural state such as Mississippi, attorneys should be familiar with the Internal Revenue Code as it pertains to farmers. They particularly should be alert both to possible tax savings available to farmers and to the use of our agricultural environment for tax savings for all of their clients.

One factor to be considered in utilizing any potential tax savings plan is that farmers may use the cash basis method of accounting.[2] Under this method income is included as gross income in the year it is actually or constructively received, and farm expenses are deductible only in the year that they are actually paid.

A description of the use of the cash method is set forth in Reg. § 1.471-6(a). This regulation gives a farmer the option of making his return on the accrual (inventory) method or the cash method. It reads as follows:

> A farmer may make his return upon an inventory method instead of the cash receipts and disbursements method. It is optional with the taxpayer which of these methods of accounting is used but, having elected one method, the option so exercised will be binding upon the taxpayer for the year for which the option is exercised and for subsequent years unless another method is authorized by the Commissioner as provided in paragraph (e) of § 1.446-1.[3]

Before proceeding further it might be well to note who is considered a "farmer" and what is a "farm" under the Code. For the purposes of § 1.61 of the regulations a farm is defined in the following terms:

> Definition of "farm"—As used in this section, the term "farm" embraces the farm in the ordinarily accepted sense, and includes stock, dairy, poultry, fruit, and truck farms; also plantation, ranches, and all land used for farming operations. All individuals, partnerships, or corporations that cultivate, operate, or manage farms for gain or profit, either as owners, or tenants, are designated as farmers.[4]

Farming is also defined in section 1.175 of the Regulations:

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[1] "RENT-A-COW. Unique method of acquiring registered cattle as 100% business expense. Progeny tax-free until herd is liquidated as 'capital gains.'" *See* CHANGING TIMES, April 1968, at 33.

[2] Treas. Reg. § 1.61-4(a).

[3] Treas Reg. § 1:471-6(a).

[4] Treas. Reg. § 1.61-4(d).

> Definition of "the business of farming". The method described in section 175 is available only to a taxpayer engaged in "the business of farming". A taxpayer is engaged in the business of farming if he cultivates, operates, or manages a farm for gain or profit, either as owner or tenant. For the purpose of section 175, a taxpayer who receives a rental (either in cash or in kind) which is based upon farm production is engaged in the business of farming.[5]

These broad definitions operate to provide the farmer with substantial tax benefits. A definition of "farming" must be quite liberal to embrace all of those deserving of special tax treatment, because of the varied types of agricultural operations in existence throughout the country.

One does not need to have a farm to be considered a "farmer." In one case the taxpayer did in fact own no land.[6] Instead, he rented land on which to place and care for his breeding herd. The court recognized it as common practice in that area to lease land on which to keep one's breeding herd.

It should be noted also that taxpayers who breed, train, and race horses are also in the business of farming. For instance, Treasury Regulations 1.175-4(a) (1) defines "land used in farming" in part as: "land . . . used for the production of crops, fruits, or other agricultural products or for the sustenance of 'livestock.' The term livestock includes cattle, hogs, *horses*, mules, donkeys. . . ." (Emphasis added). One may purchase a race horse, reside in New York, and lease pasturage in Kentucky and England and still be considered a farmer.[7]

This broad definition of a "farmer" contained in the Regulations has suggested to many enterprising taxpayers a tax advantage to be obtained by building up a breeding herd of their own by leasing[8] bred

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[5] Treas. Reg. § 1.175-3.

[6] Miller v. Connell, 141 F. Supp. 361 (W. D. Mo. 1956).

[7] Field v. Commissioner, 26 B.T.A. 116 (1932), *aff'd* 67 F.2d 876 (2d Cir. 1933).

[8] A cattle-lease contract, in addition to stating date, the lessor's name, the lessee's name, the term and rates of the lease, and the parties' signatures, would contain at least some of the following provisions:

(1) An agreement that the lessor will bear the expenses of maintaining the cattle;
(2) An allocation of the local taxes on the cattle;
(3) An agreement as to who would bear the risk of loss and a provision for replacement of lost cattle;
(4) A clause stating that the lessor will be responsible for complying with any governmental regulation relating to the raising of cattle;
(5) A provision for identifying lessee's cattle by tattooing a registration number on their ear;
(6) An agreement concerning servicing the cattle;
(7) Any other agreement which the parties wish to make to control their arrangement.

cows and retaining the resulting calf crop. The leasing expense and all maintenance expense of the herd can be deducted from ordinary income.[9] The offspring of the breeding, draft, or dairy animals held for twelve months or longer can then be sold with the income taxed at capital gains rates.[10] The over-all effect of this interplay of the code sections is often a substantial tax savings for the "farmer." Therefore, a closer look should be taken at these sections and the way in which they operate.

The Internal Revenue Code reads in part as follows:

> In General—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—
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> > (1) a reasonable allowance for salaries or other compensation for personal services actually rendered;
> > (3) rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.[11]

Section 1.162-12 of the Regulations allows deductions from ordinary income for all expenses incurred in the business of farming. It reads as follows:

> A farmer who operates a farm for profit is entitled to deduct from gross income as necessary expenses all amounts actually expended in the carrying on of the business of farming. The cost of ordinary tools of short life or small cost, such as hand tools including shovels, rakes, etc., may be deducted. The purchase of feed and *other costs connected with raising livestock* may be treated as expense deductions insofar as such costs represent actual outlay, but not including the value of farm produce grown upon the farm or the labor of the taxpayer. . . . The cost of farm machinery, equipment and farm buildings represents a capital investment and is not an allowable deduction as an item of expense. Amounts expended in the development of farms, orchards, and ranches prior to the time when the productive state is reached may be regarded as investments of capital. . . . Amounts expended in *purchasing* work, breeding, or dairy animals are regarded as investments of capital, and shall be depreciated unless such animals are included in an inventory in accordance with § 1.61-4. (Emphasis added).[12]

The expenses included in this section are many and varied.[13] More

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[9] Treas. Reg. § 1.162-12.
[10] INT. REV. CODE of 1954, § 1231.
[11] INT. REV. CODE of 1954, § 162 (2).
[12] Treas. Reg. § 1.162-12.
[13] *See, e.g.*, FARMER'S TAX GUIDE (1967), pp. 28-31.

pertinent to the "rent-a-cow" plan is the fact that "Labor Hired," "Feed Purchased," "Supplies Purchased," "Breeding Fees," and "Rent of Farm, Pasture" are all specifically included as allowed deductions.[14]

An analogy could be drawn between the rental of cattle and the rental of land. In both cases the leasing expenses would be deductible by the lessee. The crop from the leased land would belong to the lessee. Similarly, the calf crop from the leased cows would be the property of the lessee. The lessor of the land and the lessor of the cow each would retain title to the leased property; the lessee acquires title to neither the land nor the bred cow, however, he is entitled in each case to the crop yielded.

One consequence of the use of the cash method is that all of the expenses pertaining to the leasing of cows and the raising of their offspring can be deducted in the year in which the expenses are paid. The resulting situation is summarized by a quote from a case[15] dealing with the basis to be used in computing the gain on the sale of breeding livestock.

> Although generally taxpayers, even though they report their income on a cash basis, are required to capitalize the cost of all assets used in their trade or business with a useful life in excess of one year and recover such cost by way of depreciation, there has long been in respondent's regulations an exception for farmers. A farmer who reports income on the cash basis may deduct currently in computing his yearly income the cost of raising breeding animals on his farm regardless of the useful life of such animals and capitalize for recovery through depreciation deduction only the cost of purchased breeding animals. A farmer who elects this method has a basis of zero in the breeding animals he has raised since he has recovered his total cost by way of deduction in computing his annual income. This permits the deduction from ordinary income for the cost of raising breeding animals instead of a postponement of the deduction to be taken in determining a capital gain or loss when such animal is disposed of.[16]

Under the Regulations[17] animals used for breeding purposes and culled as unfit or unsuitable for such purposes constitute "property used in the trade or business." Their sale results in a section 1231 gain or loss, *i.e.*, capital gain. The only limitation is that the livestock be held by the taxpayer for twelve months or more. The regulations under this section supply the basic concepts:

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[14] See Schedule F (Form 1040), Schedule of Farm Income and Expenses (1967).

[15] Kittitas Ranch, Inc., 36 T.C.M. 697 (1967).

[16] *Id.* at 702.

[17] Treas. Reg. § 1.1231-2(b).

> Livestock held for draft, breeding, or dairy purposes
> (a) Section 1231 applies to the sale, exchange or involuntary conversion of livestock, regardless of age, held by the taxpayer for draft, breeding, or dairy purposes, and held by him for 12 months or more from the date of acquisition. For the purposes of section 1231, the term "livestock" is given a broad, rather than a narrow, interpretation and includes cattle. . . .
> (b) Whether or not livestock is held by the taxpayer for draft, breeding, or dairy purposes depends upon all of the facts and circumstances in each case. The purpose for which the animal is held is ordinarily shown by the taxpayer's actual use of the animal. However, a draft, breeding, or dairy purpose may be present if an animal is disposed of within a reasonable time after its intended use for such purpose is prevented or made undesirable by reason of accident, disease, drought, unfitness of the animal for such purpose, or a similar factual circumstance.[18]

A brief review of the history of § 1231 would be helpful in understanding how it relates to the breeding of livestock. In 1942 Congress added subsection 117(j)[19] to the Internal Revenue Code of 1939. This was the predecessor of § 1231, and it allowed capital gains treatment for property used in the trade or business. An interpretation by the Service[20] included livestock used for draft, breeding, or dairy purposes in this catagory. However, both this interpretation and one a year later[21] denied capital gains treatment under section 117(j) to animals "culled from the breeding herd." The phrase "culled from the breeding herd" was interpreted as

> the normal selection for sale of those animals which, due to injury, age, disease, or for any other reason (other than that of changing the breed or the quality of the offspring) are no longer desired by the livestock raiser for breeding purposes, and also the normal selection for sale of animals for the purpose of maintaining the herd at a regular size.[22]

Litigation soon arose which challenged the Service's interpretation denying capital gains treatment to "culls." The courts generally held against the commissioner's interpretation with *Albright v. United States*[23] representing a major setback for the Service.[24] In this case the court

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[18] Treas. Reg. § 1.1231-2.

[19] 56 Stat. 846 (1946).

[20] I. T. 3666, 1944-1 Cum. Bull. 270.

[21] I. T. 3712, 1945-1 Cum. Bull. 176.

[22] *Id.* at 176.

[23] 173 F.2d 339 (8th Cir. 1949), *rev'g* 76 F. Supp. 532 (D. C. Minn. 1948).

[24] See 3B Mertens, Law of Federal Income Taxation, § 22.130 at 767 (rev. ed. 1966).

ruled that § 117(j) would apply to dairy cows which were removed from the herd and sold because they were no longer productive. The court stated:

> Nothing in the language of the section justifies the inference that a farmer should be denied the right to treat the profits received from the sales of such livestock when they are no longer profitable or fit for use in the farmer's business as productive of capital gains and not of ordinary income.[25]

To clear up the situation Congress included a provision in the Revenue Act of 1951[26] which allowed capital gains treatment for livestock held for dairy, breeding, and draft purposes for more than twelve months.[27]

The area of controversy then shifted to the question of whether or not livestock was held for these favored purposes, since livestock held for sale in the ordinary course of business were not entitled to section 1231 treatment. The Tax Court summarized the problem:

> The term "capital assets" as defined in section 117 includes "livestock, regardless of age, held by the taxpayer for draft, breeding, or dairy purposes, and held by him for 12 months or more from the date of acquisition." However, the term does not include "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business." The question of whether livestock is held for draft, breeding, or dairy purposes or is held primarily for sale to customers in the ordinary course of trade or business is one of fact to be determined from a consideration of all the evidence bearing on the question. . . . [T]he important thing in determination of the question is the taxpayer's motive or purpose in holding the cattle.[28]

It appears, perhaps, that the primary test of whether livestock was held for breeding purposes is the taxpayer's intent. For instance, the Regulations provide the following example:

> Example (1). An animal *intended* by the taxpayer for use by him for breeding purposes is discovered to be sterile or unfit for the breeding purposes for which it was held, and is disposed of within a reasonable time thereafter. This animal is considered as held for breeding purposes. (Emphasis added.)[29]

The intent of the taxpayer to hold the livestock for breeding purposes is an important factor in whether they are considered capital assets.[30]

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[25] 173 F.2d 339, at 344.

[26] 65 Stat. 501 § 324 (1951).

[27] See 3B MERTENS, LAW OF FEDERAL INCOME TAXATION, § 22.130 (rev. ed. 1966).

[28] George W. DeHaven, Jr., 29 T.C.M. 676, 680 (1960).

[29] Treas. Reg. § 1.1231-2(c).

[30] *See, e.g.*, McDonald v. Commissioner, 214 F.2d 341 (2d Cir. 1954).

Calves under certain ages cannot be bred, and the Commissioner has in several cases argued successfully that heifers under the age of twenty-six months and bulls aged less than thirty-six months could not be part of the breeding herd.[31] However, that argument was rejected by the Tax Court in *James M. McDonald:*

> It is not necessary that an animal reach maturity and produce a calf for it to fall within the wording of that section [117(j) (1)]. The animal need not have been actually put to the prescribed use if it was in fact *held for the purpose of being put to that use.* . . . Actual use, of course, is an evidentiary factor to be taken into account in determining the factual question of the purpose for which the animal was held, but it is not the sole determinative. . . . [I]t cannot be said that the raised calves were held primarily for sale merely because it could be predicted that some would be sold each year. . . .[32] (Emphasis by the court)

Apparently, the fact that several calves would definitely be sold each year will not prevent them from being considered breeding animals. However, the commissioner has successfully argued that when it is definite that some cattle will be sold each year, they cannot be considered part of the breeding herd until they are physically capable of breeding. The Fourth Circuit in upholding this contention made this statement:

> As it was always known that these animals, or their equivalents in number and quality, would never be called into the herd, we do not encounter the ruling made by the Second Circuit in the McDonald case, supra, 214 F.2d 341, upon which the appellant relies. There the dairy cattle were sold for failing to "measure up to the high standards" of the herd; otherwise, the inference is, they would have been retained. Nevertheless, they were born to be herded as producers and only the after-development of undesirable characteristics diverted them. The Court decided that, although they had never been used as breeders and were under twenty-four months, yet as they were from the beginning raised for the herd, this purpose classified them as "held by the taxpayer for breeding" and thus a capital asset from birth. As already observed, we do not have that factual situation here.[33]

Therefore, it would seem that if it is certain that the taxpayer would call part of a group of calves into service in the breeding herd, if it was also certain that he would sell part of them, capital gains would only be allowed on a portion of the herd. Capital gains treatment has been

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[31] *See, e.g.*, A. Harold Schmidt, 20 T.C.M. 481 (1951), Fox v. Commissioner, 198 F.2d 719 (4th Cir. 1952).

[32] James M. McDonald, 23 T.C. 1091, 1099 (1955).

[33] Biltmore Co. v. United States, 228 F.2d 9, 12 (4th Cir. 1955).

allowed on the portion of income equal to the percentage of heifers under the age of twenty-four months which would be held to that age.[34]

Another important factor in considering whether the animal is part of the breeding herd is the actual use of the animal. In this regard the tax court has stated, "[W]here the taxpayer's declaration that he is holding an animal for breeding purposes is supported by his treatment of that animal in the course of his everyday operations, he is entitled to report his gain on the sale of the animal as capital gain rather than as ordinary income."[35]

Many other factors should be considered in determining whether an animal is part of a breeding herd. In a situation[36] similar to the one presented in a rent-a-cow plan, the taxpayer had only one herd (a breeding herd) and was allowed capital gains treatment on the sale of animals who failed to meet herd standards and were culled. The court said, "Petitioner's affirmative acts of culling undesirables from the breeding herd; segregation of the culls from that herd until disposition; sale of only the culled animals; and continual increase of the size of that herd all are corroborative of his stated intention."[37] Other factors which influenced the court include:

> Finally, we note that this is not the case of a successful cattle breeder who is also profitably engaged in the day-to-day business of selling breeding cattle. . . . Rather, petitioner maintained only one herd which he devoted exclusively to breeding purposes. Moreover, his efforts were directed solely towards the maintenance and improvement of that herd. He had entered the cattle business only shortly before the years in issue, and consequently had just begun to establish himself as a breeder. Hence we do not regard his contention that he was holding each animal acquired for breeding purposes as unrealistic.[38]

The tax aspects of a cattle leasing plan are relatively settled. A lessee developing a breeding herd under the broad definition contained in the Regulations would be considered in the business of farming.[39] Through the use of the cash method as permitted by the Regulations[40] he can, as lessee, deduct the expenses of leasing the cows, care for their calves, and annual care for the breeding herd.[41] If he should decide

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[34] Vaughan v. Commissioner, 333 F.2d 714 (9th Cir. 1964).

[35] M. P. Moore, 31 T.C. 735, 744 (1959).

[36] L. D. Hancock, 31 T.C. 752 (1959).

[37] *Id.* at 757-758.

[38] *Id.* at 758.

[39] Treas. Reg. § 1.61-4(d) (providing there is no "hobby" situation).

[40] Treas. Reg. § 1.471-6(a).

[41] Treas. Reg. § 1.162-12.

to cull inferior animals from his herd, the taxpayer can take capital gains treatment on any gains he might realize.[42] The net effect, in a sense, is to transform ordinary income into capital gains.[43]

An additional factor which will make the plan even more effective should be noted. The cash basis taxpayer, rather than capitalizing his cost of raising the animals in the breeding herd, may deduct them each year. The following quotation from the case of *Little v. Commissioner*[44] illustrates the results:

> Because of the difficulty of ascertaining the true cost of raising a breeding herd, the commissioner in his regulations has in effect provided that such costs need not be separately capitalized, but that the breeding herd is to be treated in the same manner as the income herd. The result, whether the taxpayer is on the cost or on the unit-livestock-price inventory method of accrual accounting, is a single unified accounting system applying both to the income herd and to the breeding herd and making for ease of accounting both to the taxpayer and to the commissioner.
>
> To the cost method taxpayer this means that costs of raising the breeding herd are annually reported as a part of the over-all costs of operation. On sale of the breeding animals, they are given a zero basis. Reg. 111, § 29.22(a)-7. Thus the entire proceeds of sale are reportable as capital gain. This fact is noted by Mertens, Vol. 3B, Law of Federal Income Taxation, page 569, § 22.130 in the following language:
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> > A taxpayer who can qualify for capital gain treatment under section 1231 obtains an advantage if he uses the cash basis of accounting rather than the accrual basis, for under the cash basis the costs of raising animals are currently deducted, leaving a reduced basis which on disposition of the animals results in greater capital gain than if the costs had been capitalized. Consequently, an ordinary deduction is obtained at the cost of a capital gain.[45]

The favorable aspect of a cattle-leasing plan is apparent. The issue of the leased cattle which are raised from birth will have a zero basis in the hands of the lessee since the lessee annually deducts the costs of raising the cattle as a business expense. A capital gain is taken on the entire sale price instead of on only part of it as would be the result if the basis were greater than zero.

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[42] Treas. Reg. § 1.1231-2(b).

[43] See, 3B MERTENS, LAW OF FEDERAL INCOME TAXATION, § 22.130 (rev. ed. 1966).

[44] Little v. Commissioner, 294 F.2d 661 (9th Cir. 1961).

[45] *Id.* at 664.

By way of example, consider a taxpayer in the fifty percent tax bracket; he pays cattle leasing rentals of 20,000 dollars during the year. In the same tax year he sells 20,000 dollars worth of culls. Before taxes he will not have a gain or loss because his income and expenses are exactly equal. However, after taxes the picture will be different. In his bracket he will save 10,000 dollars in taxes when he takes the 20,000 dollar deduction, the farm expense will actually cost him 10,000 dollars. However, using capital gains computation, the tax on the income will be 5,000 dollars which will result in an income after taxes of 15,000 dollars. Thus, after taxes, the taxpayer will have a net income on his breeding herd of 5,000 dollars.

In view of such faborable tax treatment available to cash basis farmers it might be profitable to examine the history behind the regulation allowing the use of the cash basis. The Supreme Court succinctly stated the reason behind the original version[46] of the regulation:

> As early as 1919, however, in response to the specific need for a relatively more simplified method of farm accounting than was available even under the cash method as it then existed, the Secretary of the Treasury and the Commissioner of Internal Revenue promulgated Regulations expanding the cash method to authorize a current deduction for expenses incurred by farmers and ranchers in raising crops and animals.[47]

This regulation in its pertinent part stated that "[T]he cost of feeding and raising livestock may be treated as an expense deduction. . . ."[48] It is important to note that this has changed little over the last fifty years.[49]

The position of the lessor might well be briefly noted. He would be in the same position as any businessman who leased equipment. The lease fees would constitute ordinary income to him;[50] he could deduct any of the expenses involved in leasing or keeping the cattle;[51] and he would be allowed to take depreciation on the cattle leased.[52]

United States v. Catto,[53] decided by the Supreme Court in 1966, sheds light on several aspects of a cattle-leasing arrangement. It reaffirms the deductibility of the expenses of raising livestock, shows that the annual deductions will result in an adjusted basis of zero for breeding stock at the time of sale, considers the history of the cash method, and reiterates that, "The sacrifice in accounting accuracy under

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[46] Reg. 45, Art. 110 (April 17, 1919 ed.) (Revenue Act of 1918).
[47] United States v. Catto, 384 U.S. 102, 110 (1966).
[48] *Id.* at 110 and n. 13.
[49] See Treas. Reg. § 1.162-12.
[50] INT. REV. CODE of 1954, § 61(a)(5).
[51] INT. REV. CODE of 1954, § 162(a).
[52] INT. REV. CODE of 1954, § 167.
[53] 384 U.S. 102 (1966).

the cash method represents an historical concession by the Secretary and the Commissioner to provide a unitary and expedient bookkeeping system for farmers and ranchers in need of a simplified accounting procedure."[54]

It is submitted that the present regulations and cases permit favorable tax treatment for the farmer/lessee of cattle. Furthermore, the regulations permitting the farmer taxpayer to deduct the costs of raising livestock have been in effect for approximately fifty years and, therefore, would appear to have the force of law. It would seem that any change in this important area must be the subject of legislation.

It appears that the "rent-a-cow" plan is in truth and in fact a tax gimmick. However, all aspects of the plan, as considered above, have a sound legal basis since they meet the tests of the Code, Regulations, and cases. Perhaps the difficulty lies in our vision of a "farmer" as one in overalls hoeing a cotton patch. However, under the Code and Regulations that term is broad enough to embrace the lessee in the plan, whatever his other business or profession. Any statutory or regulatory change should be carefully scrutinized since it may effect the definition of a farm or farmer in such a manner as to produce an undesirable tax result.

James Kearney Dossett, Jr.

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[54] *Id.* at 116.

STUDENT NOTES

Defamation—Misstatement of Fact as Priviledged in Fair Comment on Public Official

The case of *New York Times Co. v. Sullivan*[1] has had profound effects on the general field of libel law in the United States. It has upset the holdings of virtually every jurisdictions, and it has, to a great extent, subjected a large portion of the law of libel to federal standards. Mississippi first felt the effect of *Times* in the recent case of *Reaves v. Foster*,[2] in which the court noted that "[t]he federal courts have preempted the field of libel and slander"[3] in the fair comment area. The court held that any statement concerning "a public official or one substantially connected with public affairs"[4] is protected by the first and fourteenth amendments of the U. S. Constitution within the requirements set down in the *Times* case. *Reaves* makes it evident that Mississippi courts and lawyers will increasingly find it necessary to rely on the myriad of confusing and often conflicting attempts to interpret the constitutional requirements set down in *Times*. This note will attempt to point out the changes *Times* has made in the Mississippi "fair comment" law and to suggest the trend of decision in that area.

Before such an attempt, however, it seems only prudent to first place the fair comment doctrine in context. At common law the tort of libel had three basic requirements: falsehood, malice, and injury.[5] In some instances a defamation was considered libel per se, or libelous on its face, and the three elements were presumed present.[6] On the other hand, libel per quod, or communications requiring extrinsic facts to show defamation, required proof of the elements, and were actionable only on proof of actual damages.[7] If, however, libel were included in the following categories, special damages need not be shown: charges involving moral turpitude;[8] a loathsome disease, once including insanity, tuberculosis, and the like, but now reduced to its original meaning of leprosy or venereal disease;[9] statements directly affecting and

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[1] 376 U.S. 254 (1964).

[2] 200 So. 2d 453 (Miss. 1967).

[3] *Id.* at 458.

[4] *Id.* at 459.

[5] Prosser, Law of Torts 753-760 (3d ed. 1964).

[6] Natchez Times Pub. Co. v. Dunigan, 221 Miss. 320, 72 So. 2d 681 (1954).

[7] N. T. Farley, Inc. v. Bufkin, 159 Miss. 350, 132 So. 86 (1931).

[8] Hughey v. Bradrich, 39 Ohio App. 486, 177 N.E. 911 (1931).

[9] Taylor v. Standard Oil Co., 184 Miss. 392, 186 So. 294 (1939); Kassowitz v. Sentinel Co., 220 Wis. 468, 277 N.W. 177 (1938).

incompatable with a man's business or means of support;[10] and the imputation of unchastity to a female.[11]

If libel is shown, there are two defenses: truth and privilege. Generally, all jurisdictions recognize a truth defense, although the defense is qualified in some jurisdictions with the requirement that the matter be published "with good motives and justifiable ends."[12] The second defense, privilege, may be either absolute or qualified. Absolute privilege, applied when society values the communication as highly important, includes judicial proceedings,[13] communications by executive officers of the Federal government, (extended in *Barr v. Matteo*[14] to include all Federal personnel), and proceedings of Congress.[15] There is a question whether legislative proceedings of the states are protected at common law, but in thirty-six jurisdictions constitutional provisions have precluded the question by protecting such proceedings.[16]

Qualified privilege, sometimes called conditional or defeasible privilege, arises in cases of definite legal relationships between the publisher and the persons for whom it is published, in situations of common pecuniary interests, and in public proceedings.[17] Under qualified privilege comes the area of public interest, which is generally divided into two areas—"public interest" and "fair comment on matters of public concern." In the "public interest" area are communications which are broad in content (and may include misstatements of fact) but limited to those to whom communicated. Examples are communications from private citizens to police officials, complainants of school board officials to school authorities, and communications between public officials. While not privileged absolutely, they can be protected by the "public interest" doctrine if made in good faith.[18] It is the doctrine of "fair comment" which was discussed in *New York Times v. Sullivan,* and which concerns

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[10] Sheffield v. Journal Pub. Co., 211 Miss. 294, 51 So. 2d 479 (1951); Cobbs v. Chicago Defender, 308 Ill. App. 55, 31 N.E.2d 323 (1941).

[11] Gnapinsky v. Goldwyn, 23 N. J. 243, 128 A.2d 697 (1957).

[12] *See generally* Ray, *Truth: A Defense to Libel,* 16 Minn. L. Rev. 43 (1931). Mississippi has such a limitation, expressly stated in the criminal libel statute, Miss. Code Ann. § 2269 (1956). Also the limitation is expressed in Art. 1 § 13 of the Mississippi Constitution.

[13] In Mississippi the privilege includes any hearing before a tribunal performing a judicial function, *ex parte* or not.

[14] 360 U.S. 564 (1959). The communications are protected so long as they are "within the outer perimeter" of the speakers exercise of his official function.

[15] Methodist Federation for Social Action v. Eastland, 141 F. Supp. 729 (D.D.C. 1956).

[16] Comment, *Defamation of a Public Official: The New York Times Case in Perspective,* 15 De Paul L. Rev. 376, 381 n. 28 (1966). [Hereafter cited as *Times in Perspective.*] In dicta, the Mississippi Supreme Court has indicated it would probably protect legislative proceedings in Grantham v. Wilkes, 135 Miss. 777, 100 So. 673 (1924) and in Krebs v. McNeal, 222 Miss. 560, 76 So. 2d 673 (1955).

[17] *Times in Perspective* at 382.

[18] Bingham v. Gaynor, 203 N. 4.27, 96 N.E. 84 (1911).

us here. It grants immunity "to those matters which are of legitimate concern to the community as a whole because they materially affect the interests of all the community."[19]

Before *Times* in a minority of jurisdictions the "fair comment" rule was held to include misstatements of fact as privileged, if they apply to "public officials."[20] The majority of jurisdictions, however, recognized no privilege extending to misstatements of fact, and the Mississippi decisions were clearly in line with the majority view. Perhaps the most succinct statement of the Mississippi rule was made in *Edmonds v. Delta Democrat Pub. Co.*,[21] in which the executive secretary of United Drys Association of Mississippi, attempting to defeat a liquor legalization referendum, was criticized in an editorial which stated that he had misrepresented the statute being voted on. The court noted:

> When a person comes prominently forward in any way and becomes a public or quasi-public figure, he invites free expression of public opinion, including criticism. When such crticism is in the *form of an opinion, relates to public assertions or acts* rather than to the individual in his private affairs, is fair in the sense that *the reader can understand the factual basis for the opinions* containing the criticism, and *the publication relates to a matter of public interest,* then the occasion is conditionally privileged; and no action will lie for such publication no matter how severe the criticism or unfavorable the comments, if the privilege is not abused. . . . The interests of society that immunity should be granted to the discussion of public affairs and that all acts and matters of a public nature may be freely discussed and published with fitting comments and strictures. (Emphasis added)[22]

The four requirements for privilege under the fair comment doctrine noted in italics in Justice Gillespie's opinion in *Edmonds,* quoted above, were generally followed in all of the majority jurisdictions. The "form of an opinion" requirement and the requirement that the factual basis of the opinion be understood often made difficult cases and bad law. The proof that a statement was fact rather than opinion was often difficult, as numerous authorities have noted.[23] Harper and James seem to feel that the determination is not that difficult, and they note that:

> The distinction between "fact" and "opinion" here . . . is somewhat nebulous, as a matter of pure logic. As a practical matter, however, it is susceptible of reasonable analysis. The important point is whether ordinary persons hearing or reading the matter complained of would be likely to understand it as an expression of the speaker's or writer's opinion, or as a state-

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[19] Prosser, LAW OF TORTS 812 (3d ed. 1964).

[20] *Times in Perspective* at 384.

[21] 230 Miss. 583, 93 So. 2d 171 (1957).

[22] *Id.* at 590-591, 93 So. 2d at 173.

[23] *See* Titus, *Statement of Fact Versus Statement of Opinion: A Spurious Dispute in Fair Comment,* 15 VAND. L. REV. 1203 (1962).

> ment of existing fact. . . . If the actual facts are accurately stated, an opinion based thereon will be understood as such and taken for what it is worth. . . . But if the facts are misstated, the subject of his remarks is at the writer's mercy, and a defamatory opinion, unless properly labeled may have the effect of a statement of fact.[24]

Such simplicity of determination was rarely attainable. Two cases decided under this doctrine illustrate the difficulty involved. In *Eikhoff v. Gilbert*[25] Gilbert printed a circular urging people not to vote for Eikhoff because he championed measures in the legislature "opposed to the moral interests of the community."[26] At the trial he introduced evidence that Eikhoff supported "pro-saloon" bills in the legislature to prove his accusations. The Supreme Court of Michigan held that Gilbert made the statements on moral interests as "fact,"[27] and thereby they were not protected by fair comment. In *Pott v. Dies*[28] the defendant quoted an article by the plaintiff which called Hitler "the George Washington of Germany."[29] The defendant imputed that the plaintiff was "The Nazi Trojan Horse" in America[30] for writing the article. The court held that the "Trojan Horse" statement was one of opinion, not of fact.[31] Mississippi has had very few cases on the subject. In *Edmonds v. Delta Democrat Pub. Co.*[32] statements that the executive secretary of the Mississippi Drys association had misrepresented the effects of a proposed liquor statute were held to be opinion. In *Krebs v. McNeal*[33] the court apparently assumed without discussion that statements alleging a candidate for office had shot up his own car to gain sympathy votes were statements of fact. Not only are the terms susceptible to interpretation, but also the manner in which they are used. The Kentucky court, in *Gearhart v. WZAZ Inc.*,[34] stated:

> I believe it is proper to point out a distinction in this case between a broadcast or telecast read from a manuscript and libelous matter printed in a newspaper or publication. A written statement in its full context with proper punctuation may appear to the public in one light. The same matter read in a telecast by a trained individual, whose profession requires him to make the news interesting, by emphasis and accent may leave an entirely different impression.[35]

Recognizing this difficulty the courts in a minority of jurisdictions

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[24] 1 Harper and James, Law of Torts 458 (1956).
[25] 124 Mich. 353, 83 N.W. 110 (1900).
[26] *Id.*, 83 N.W. at 111.
[27] *Id.*, 83 N.W. at 113.
[28] 132 F.2d 734 (D.C. Cir. 1942).
[29] *Id.*
[30] *Id.*
[31] *Id.* at 735.
[32] 230 Miss. 583, 93 So. 2d 171 (1957).
[33] 222 Miss. 560, 76 So. 2d 693 (1955).
[34] 150 F. Supp. 98 (E. D. Ky. 1957).
[35] *Id.* at 108.

had abandoned the test of "fact or opinion" and protected all statements regarding public activities.[36] Perhaps the most unusual case involving this minority doctrine is *Weinstein v. Rhorer*,[37] in which a campaign worker described an incumbent politician as "a whore-hopper," a "drunkard," and a "grafter."[38] The court held that he was protected by the doctrine of fair comment, stating:

> It is clear . . . that [the defendant] and a number of other parties to whom these communications were made were actively engaged in electioneering for one or the other of these candidates. Under such circumstances, a discussion of a candidates conduct and moral fitness, *if made in good faith, without actual malice and with good grounds for believing them to be true,* would be privileged communications. Although the law presumes malice where publications are slanderous per se, yet where the publication is made under circumstances disclosing qualified privileges, it is relieved of that presumption and the burden is on the plaintiff to prove actual malice.[39] (Emphasis added)

The doctrine shown in the italicized portion of the opinion states the criterion of the minority rule that has come to be known as the "public official rule" which was eventually adopted and expanded in *Times*. Reasons which are given to justify the minority position are that a person would be afraid to speak out if he were not sure his statements would survive the court test of "fact or opinion"[40] (and if fact, the "truth" test), that the burden is placed on the plaintiff where it should be, rather than having the burden of justification placed on the defendant by the majority rule,[41] and that most public figures are in a position to defend themselves more easily than private citizens and are not in so great a need of court protection.[42]

It is in this general area of "fair comment" or the public official defense that *New York Times Co. v. Sullivan*[43] was decided. In *Times* a police commissioner brought suit for an advertisement allegedly defaming him in his official capacity. In the advertisement there were misstatements of facts. The court, in its opinion, vindicated the former minority position, holding that the advertisement was privileged and established the minority rule as the national standard obligatory on all states in cases in which public officials are involved. The Court based its opinion on the constitutional guarantee of freedom of expression in

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[36] Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908) is the leading case. States which had similar holdings are Iowa, Minnesota, New Hampshire, Georgia, Pennsylvania, Vermont and Utah. See *Times in Perspective* at 384 and n. 36.

[37] 240 Ky. 679, 42 S.W.2d 892 (1931).

[38] *Id.*, 42 S.W.2d at 892-893.

[39] *Id.*, 42 S.W.2d at 894-895.

[40] Titus, *Statement of Fact Versus Statement of Opinion: A Spurious Dispute in Fair Comment*, 15 VAND. L. REV. 1203, 1209 (1962).

[41] Coleman v. MacLennan, 78 Kan. 711, 98 P. 281, 290 (1908).

[42] Titus at 1209-1210.

[43] 376 U.S. 254 (1964).

the first amendment, and it also used the due process clause of the fourteenth amendment. In rejecting the majority rule as it applied to misstatements of facts, the Court criticized the old "fact or opinion" and "truth" tests, stating that "erroneous statement is inevitable in free debate"[44] and further noting that under the majority rule:

> Allowance of the defense of truth with the burden of proving it on the defendant, does not mean that only false speech will be deterred. . . . Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone." . . . The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.[45]

In emphasising the importance of holding that the first amendment protections allow free debate with its inevitable misstatements of fact the Court stated that private injury was subordinate to the public welfare. Citing *Coleman v. MacLennan* with approval, the Court further emphasized that the discussion of candidates' character and qualifications was of paramount concern. Inconvenience and occasional injury to reputation, though at times it may be great, is outweighed by the benefit to the public by such discussion.[46]

> The Court explained that it had considered:
> this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.[47]

The Court quoted *Sweeney v. Patterson,* which had noted that "[w]hatever is added to the field of libel is taken from the field of free debate."[48] In discussing the possibility that injury to private reputation, as contrasted with public reputation, might occur as a result of the opinion, the Court in *Garrison v. Louisiana,* the first "public official" case after *Times,* stated that:

> The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant. Few personal attri-

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[44] *Id.* at 271.
[45] *Id.* at 279.
[46] *Id.* at 281.
[47] *Id.* at 270.
[48] 128 F.2d 457, 458 (D.C. Cir. 1942), *cert. denied,* 317 U.S. 678, quoted at 376 U.S. 254, 272.

> butes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character.[49]

Going even further in defining what can be said about a public official Justice Black in *Rosenblatt v. Baer*[50] called *Times* a "short and inadequate step" and said that anyone should have an "unconditional right to say *what one pleases* about public affairs."[51] (Emphasis added). The majority, however, did not go that far, but remanded the case for the determination of malice.

It appears that these holdings expand the privilege given by the Court before *Times* in *Barr v. Matteo*[52] in which defamatory utterances by federal officials were held to be privileged if "within the outer perimeter" of their duties. In that case the court had said that such a holding would not "inhibit the fearless, vigorous, and effective administration or policies of government," but that "it would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves."[53] It said that private critics should have such an immunity.

However, allowing a wide variety of statements to be made about anyone who fits within the public official category ignores a basic policy of privacy which limits policies of free discussion. As Mr. Justice Stewart noted while concurring in *Rosenblatt,* the first amendment is not the sole value in the field of defamation:

> The right of a man to protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being. . . .[54]

The heart, therefore, of the *Times* holding is found in the following quote:

> The constitutional guarantees require, we think, a federal rule that prohibits a *public official* from recovering damages for *defamatory falsehood relating to his official conduct* unless he proves that the statement was made with *"actual malice"*—that is, *with knowledge that it was false or with reckless disregard of whether it was false or not.*[55] (Emphasis added).

The interpretation of this ruling has caused great confusion in the courts, first as to who is a "public official," and second, as to what exactly is "actual malice," as well as the "official conduct" question which has not been litigated fully.

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[49] 379 U.S. 64, 77 (1964).
[50] 383 U.S. 75 (1966).
[51] *Id.* at 95.
[52] 360 U.S. 564 (1959).
[53] *Id.* at 571.
[54] 383 U.S. 75, 92 (1966).
[55] 376 U.S. 254, 279-280 (1966).

In this context the case of *Reaves v. Foster*[56] was presented to the Mississippi Supreme Court in 1967. In that case the Benton County Citizens Club, which had as one of its objectives the betterment of the Negro's position from an educational standpoint, in consultation with Aviva Futorian, a civil rights worker, established a newspaper called "The Freedom Train." In the paper the principal of the local Negro School was called an "Uncle Tom," a "puppet or dummy," "a traitor to his race," "a stooge," a "stool Pigeon," a "betrayer," and generally criticized for his administration of the school. The paper further stated that he made the children work during school hours and allowed gambling on the school buses. The Mississippi Supreme Court in reaching its decision noted that *Edmonds v. Delta Democrat Pub. Co.*[57] had established the fair comment doctrine in Mississippi. The court held that the matters published "appear to be opinions" and that "[t]he articles in the pamphlet showing facts support the opinions."[58] Thus the court seemed to recognize the old "fact or opinion" distinction as still valid in public official cases. Throughout the opinion, however, the court cited the *Times* tests, explained in *Garrison* and *Henry v. Collins*,[59] as they applied to misstatements of facts, so the court inferentially recognized that misstatements of facts may be privileged, so long as they meet the requirements of the *Times* test. It is submitted that the court had no need to mention the "opinion-fact" question, since it had been discarded as no longer valid in *Times*. Of much greater concern to the court in *Reaves*, was the effect of the *Times* "malice" requirement on the Mississippi fair comment law. In *Edmonds* the court had stated:

> Whether the privilege [of fair comment] has been abused is usually a question of whether the criticism was made with an honest purpose or was made with malice in the sense of spite or ill will, or culpable recklessness or negligence. When the occasion is privileged, malice will not be presumed. The presumption is that it was in good faith.[60]

This test for malice in "public official" cases used by the Mississippi courts was destroyed by *Times*. The *Times* malice requirement was stated as "with knowledge that it was false or with reckless disregard of whether it was false or not."[61] It is clear that if actual knowledge of falsity if proved, the matter cannot be privileged. But what is "reckless disregard?" *Garrison v. Louisiana* showed the sweeping change made in the malice requirement, when "intent to inflict harm" was held not to be malice, and it further defined the malice test when it stated:

> The reasonable-belief standard . . . is not the same as the reckless-disregard of-truth standard. According to the trial court's opinion, a reasonable belief is one which "an ordinary prudent man might be able to assign a just and fair reason for" the sug-

[56] 200 So. 2d 453 (Miss. 1967).
[57] 230 Miss. 583, 93 So. 2d 171 (1957).
[58] 200 So. 2d 453, 456 (Miss. 1967).
[59] 380 U.S. 356 (1965).
[60] 230 Miss. 583, 591-592, 93 So. 2d 171, 174 (1957).
[61] 376 U.S. 254, 280 (1964).

> gestion is that under this test the immunity from criminal responsibility in the absence of ill-will disappears on proof that the exercise of ordinary care would have revealed that the statement was false. The test which we laid down in New York Times is not keyed to ordinary care; defeasance of the privilege is conditioned, not on mere negligence, but on reckless disregard for the truth.[62]

A showing of ill will did not suffice, and a publisher could not be held liable "even if he did speak out of hatred."[63]

The Mississippi court further pointed out that in *Henry v. Collins*,[64] the Supreme Court of the United States had rejected the Mississippi Court's instruction "that malice may consist of culpable recklessness or ill will, and wanton disregard of the rights and interests of the person defamed."[65] The Supreme Court of the United States held that a jury "might have construed these instructions to warrant recovery on the showing of an intent to inflict harm rather than intent to inflict harm through falsehood. . . ."[66] Thus, the Mississippi court in *Reaves* held that the federal courts "have established that hatred, ill will, enmity, intent to harm or negligence are insufficient to establish malice toward those involved in discussions on public issues.[67]

Courts in other jurisdictions have circumvented the *Times* malice holding through interpretation and appear to have reverted to the old "fact-opinion" test. In *Pape v. Time, Inc.*,[68] a magazine reported that a commission report had stated as fact certain allegations that had been made by the complainant in a civil suit. In fact, the commission report had correctly noted that the statements were allegations. The Seventh Circuit held that reporting the conduct as fact, rather than as an allegation could constitute "reckless disregard" and rebut the "public official" privilege. In *Keogh v. Pearson*[69] malice was implied from the language itself, as the court held:

> As defamatory statements become more and more vindictive, cruel and scandalous, they increasingly give cause to the printer and publisher to take care. He who tends to disregard the vengeful nature of his printing, tends to recklessly have disregard for the truth.[70]

The interpretation and application of the *Times* tests causes such a sharp division in the courts of the United States that the Supreme Court in the summer of 1967 rendered a single opinion on the two cases of *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker* to

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[62] 379 U.S. 64, 79 (1964).

[63] *Id.* at 77.

[64] 380 U.S. 356 (1965).

[65] 200 So. 2d 453, 457 (Miss. 1967).

[66] *Id.* at 458.

[67] *Id.*

[68] 354 F.2d 558 (7th Cir. 1965).

[69] 244 F. Supp. 482 (D.D.C. 1965).

[70] *Id.* at 485.

further clarify the application of the Times doctrine.[71] Although the Court attempted to base its decision on the distinction between "public officials" and "public figures," it became readily apparent that the underlying cause for the opinion was the reluctance of a number of courts to apply the relatively broad malice test of *Times* to "public figures" not directly connected with government. A result of the opinion was the establishment of a separate and distinct malice test for "public figures" as contrasted with "public officials." Thus the court, in the majority-of-four opinion by Mr. Justice Harlan, with Justices Stewart, Clark, and Fortas joining, indicated a fear that *Times* would become "a talisman which gives the press constitutionally inadequate protection only in a limited field, or, what would be equally unfortunate, one which goes far to immunize the press from having to make just reparation for the infliction of needless injury upon honor and reputation through false publication."[72]

In balancing the two interests the opinion analogized the *Times* case and similar "public officials" cases to the old prosecutions for seditious libel.[73] It held that since "public figure" cases, as opposed to "public official" cases, had no similarity to seditious libel cases, and since recovery by "public figures" could not be viewed as a judicial "vindication of governmental policy,"[74] the *Times* malice tests should not be the "only appropriate accommodation of the conflicting interests at stake."[75] It did note, however, that the public interest to be served by fair comment on "public figures" was no less than the protected for "public officials" in *Times*. Thus, while distinguishing "public figure" and "public official" cases, the Court continued to subject the fair comment area of libel to federal standards, noting that "libel actions of the present kind cannot be left entirely to state libel laws, unlimited by any overriding constitutional safeguard. . . ."[76]

The majority of four then proceeded to set forth a "malice" test for public figures no less susceptible to wide interpretation than the public official test. The test was stated as follows:

> a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.[77]

The Court then examined the facts of the cases and held that the article in the Saturday Evening Post alleging "fixing" of football games by Georgia coach Butts did not fall within the protection of the new rule. Reasons given were: the story was not "hot news" and thereby susceptible to error in the rush to beat deadlines; the editors recognized the

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[71] Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).
[72] *Id.* at 135.
[73] *Id.* at 153-154.
[74] *Id.* at 154.
[75] *Id.* at 155.
[76] *Id.*
[77] *Id.*

need for thorough investigation; the notes of the writer had not been examined; sources had not been checked; sports authorities had not been contacted; and the language of the article seemed vindictive. In the Walker case, however, the story printed by the Associated Press was protected, since it required immediate dissemination, the writer prior to the story had given every indication of being trustworthy and competent, and his prior dispatches were internally consistent.

In *Butts* the court rejected a plea that punitive damages in public figure cases be governed by *Times,* even though actual damages would be governed by the new test. It held that punitive and compensatory damages should be subject to the same "constitutional standards of misconduct."[78]

Although concurring in the result, Chief Justice Warren criticized the new public figure test as an "unusual and uncertain formulation" which could be of little guidance for a jury. He also questioned whether the test could adequately protect free speech and debate.[79] He stated that a differentiation between "public officials" and "public figures" had no basis in law, logic, or first amendment policy, since distinction between governmental and private sectors in public issues have become blurred. Since public figures "often play an influential role in ordering society,"[80] he stated that they should be subjected to the same protections and restraints as public officials. He concurred in the result of both cases, however, noting that the course of investigation pursued by Curtis Publishing Co. could be interpreted as "the degree of reckless disregard for the truth of which we spoke in *New York Times* and *Garrison.*"[81] It is interesting to note that in *Times,* the Court had held that when neither the advertising manager, "nor anyone else at the Times made an effort to confirm the accuracy of the advertisement, either by checking it against recent Times news stories . . . or by any other means,"[82] a finding of malice could not be supported, but at most only a finding of negligence, constitutionally insufficient to show the recklessness required. It is further interesting to note that the Chief Justice pointed out in *Butts* that statements in the article, in themselves, indicated that the *Saturday Evening Post* "proceeded on its reckless course with full knowledge of the harm that would likely result from publication of the article,"[83] remarkably similar to the Seventh Circuit holding in *Keogh v. Pearson.*[84]

Justices Black and Douglas criticized the new rule and also the opinion of the Chief Justice. They felt that the press should be free from all libel suits, noting that "the Court will not give the First Amendment its natural and obvious meaning by holding that a law which seriously menaces the very life of press freedom violates the

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[78] *Id.* at 160.
[79] *Id.* at 163.
[80] *Id.* at 164.
[81] *Id.* at 170.
[82] 376 U.S. 254, 261 (1964).
[83] 388 U.S. 130, 170 (1967).
[84] 244 F. Supp. 482 (D.D.C. 1965).

First Amendment."[85] Justices Brennan and White agreed with the Chief Justice as to which rule to apply, but joined with Black and Douglas in criticizing the Court's taking from the jury the role of examining the evidence and determining liability.[86]

Because of the emphasis placed on the difference between "public officials" and "public figures" by the majority opinion and the still present question of determining whether a defamed person is either or none, required by Justices Warren, Brennan, and White, it becomes necessary to examine and re-evaluate the cases which have ruled on the question of "Who is a public official?"

The *Times* case was restricted to governmental employees, but it did not state how far down the ladder the test would be applied. It has been applied to a city policeman[87] and a former supervisor of a county recreation area.[88] In *Garrison*[89] the Court stated that the test would apply to both criminal and civil cases. In *Pauling v. News Syndicate Co.*[90] the Second Circuit Court of Appeals, though deciding on grounds other than the public official doctrine, stated:

> Although the public official is the strongest case for the constitutional compulsion of such a privilege, it is questionable whether in principle the decision can be so limited. A candidate for public office would seem an inevitable candidate for extention; . . . Once that extention was made, the participant in public debate on any issue of grave public concern would be next in line.[91]

It can be seen that the majority in *Butts* might not extend the protection to a participant on an issue of public concern, but the candidate for an office, especially one who opposes an incumbent, would receive an advantage from application of different rules to a "public figure" and "public officials." Going further down the line the court protected comment by an Alaskan newspaper attacking columnist Drew Pearson, when attack arose because of columns Pearson had written during an election campaign involving an Alaskan candidate.[92] The court noted that there was "no reasonable basis to exempt those who presume to speak for such candidates, particularly those public figures of international stature.[93] In *Fignole v. Curtis Publishing Co.*[94] a Haitian politician living in exile whose campaign slogans had been misquoted was held not includable under *Times,* and in *Clark v. Pearson*[95] a lobbyist, suing for a newspaper column suggesting he had "bought" a con-

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[85] 388 U.S. 130, 171 (1967).
[86] *Id.* at 172.
[87] Gilligan v. King, 48 Misc. 2d 212, 264 N.Y.S. 2d 309 (Sup. Ct. 1965).
[88] Rosenblatt v. Baer, 383 U.S. 75 (1966).
[89] 379 U.S. 64 (1964).
[90] 335 F.2d 659 (1964).
[91] *Id.* at 671.
[92] Pearson v. Fairbanks Pub. Co. 33 U.S.L.W. 2307 (Alaska Super. Ct. 1964).
[93] *Id.* at 2309.
[94] 247 F. Supp. 595 (S.D.N.Y. 1965).
[95] 248 F. Supp. 188 (D.D.C. 1965).

gressman, was not included in the privilege. In *Harper v. National Review*[96] a professor of law at Yale who had signed a petition opposing U. S. policy in Vietnam, and was criticized as having "given aid and comfort to the enemies of this country," was held not a "public official." Generally athletes and athletic-related personages have been held not to be "public officials."[97]

It can be seen that before *Butts* the lines of division into protected and non-protected areas had been slowly forming. However, in the cases above noted a person was deemed either a "public figure," and subjected to the broad *Times* malice test; or he was not, and was thereby subjected to the common law malice tests. In *Butts* the Court appeared to be attempting to find a middle ground, and establish a graduated scale of protection. To the degree a man enters the public arena and to the extent that the issues he speaks out on are important to society, to that extent he exposes himself to possible defamatory misstatements of fact.[98] At the top of the scale are govermental officers and candidates for those offices. Because of the importance of free discussion of officers and candidates to the governmental structure and constitutional form of government, the *Times'* broad and inclusive protections apply. At the bottom of the scale is the private individual, who can be discussed and criticized only within the narrower confines of common law standards. However, it was realized that in the middle of the scale were persons who commanded a "substantial amount of independent public interest,"[99] who would be public figures under ordinary tort rules. These are persons "who command sufficient continuing public interest and had sufficient access to the means of counterargument to . . . expose through discussion . . . falsehood and fallacies,"[100] yet whose means of access and ability to rebut false statements and whose ultimate impact on society appear to be not as strong as those of public officials. Such persons are both public and private men, and the Court apparently recognized that a middle road between protections offered public and private men should be established.

With the exception of Black and Douglas' opinions, each of the opinions in *Butts* seems to recognize the need for a graduated protection from defamation. Differences come only in determining how such protection can be afforded. For example, even while refusing to recognize a separate rule applicable to public figures, Justice Warren found "reckless disregard" to be inferred from improper investigatory procedures in *Butts*, apparently retreating from the court's position in *Times* that such investigatory procedures would support at most constitutionally insufficient negligence. It is submitted that none of the opinions

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[96] 33 U.S.L.W. 2341 (N.Y. Sup. Ct. 1964).

[97] Dempsey v. Time, Inc. 43 Misc. 2d 754, 252 N.Y.S.2d 186 (Sup. Ct. 1964); Spahn v. Julian Messner, Inc., 43 Misc. 2d 219, 250 N.Y.S. 2d 529 (Sup. Ct. 1964) *aff'd* 260 N.Y.S.2d 251 (1965).

[98] *See* 388 U.S. 130, 154 (1967).

[99] *Id.*

[100] 388 U.S. 130, 155 (1967) quoting Whitney v. California, 274 U.S. 357, 377 (Brandeis J., dissenting).

present a truly satisfactory solution. As Justice Black, who presented no solution but only criticism of the concept, noted,

> If this precedent is followed, it means that we must in all libel cases hereafter weigh the facts and hold that all papers and magazines guilty of gross writing or reporting are constitutionally liable, while they are not if the quality of the reporting is approved by a majority of us.[101]

Yet perhaps Mr. Black in his criticism of the new test notes its real strength. Whether under the *Times* doctrine, as the Chief Justice advocates, or under the new "journalistic standards" test, as the majority of four advocate, the result is the same. It *will* be necessary to examine the facts of each case and evaluate the degree of public interest in the area discussed, using as a basis prior case law defining and delineating the "public official" and "public figure" areas and the "malice" tests applicable to the definitions. Whether the malice is "reckless disregard" or non-adherence to standards of investigation, or whether non-adherence to standards of investigation is "reckless disregard" must be determined by the jury as it weighs the facts of each case. The court must perform its function of providing guidelines for the jury and policing its performance of duty. *Butts* has presented only a framework, but a more recognizable framework on which to build a fair comment doctrine which balances the conflicting interests of freedom of the press and freedom of the individual from defamatory attack and invasion of privacy.

Eugene L. Fair

Torts—Effect of Mississippi's Comparative Negligence Statue on Other Rules of Law

I. Introduction

Mississippi enacted the first and only *pure* comparative negligence statute of general application in 1910.[1] The law adopts what has been referred to as *pure* comparative negligence in that it rejects the require-

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[101] 388 U.S. 130, 171 (1967).

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[1] Legislation, *Tort-Comparative Negligence Statute*, 18 Vand. L. Rev. 327, 333 (1964).

ment that an injured party's negligence must be less than a defendant's for recovery.[2]

Six other states have passed comparative negligence legislation in varying forms.[3] Fifteen states have introduced such bills but failed to enact them into law.[4] Several reasons are given for the defeat of this legislation. Two of the more frequently mentioned reasons are the concern for heavier court calendars and the possible effect upon negotiated settlements.[5] It is submitted that the need for comparative negligence legislation is lessened to some extent for two reasons: (1) acceptance of the insurance principle and consequently a wider use of various types of insurance,[6] and (2) adoption of other state and federal programs guaranteeing some recovery for an injury.[7]

This note is addressed to the following question: Does the Mississippi comparative negligence statute cut across rules of law other than contributory negligence? The courts have so far answered with a definite NO. The law, as illustrated by proximate cause and assumption of risk cases, shows that the courts apply the statute within the framework of existing legal notions. Other writers have given support to this attitude: "I think that [comparative negligence] means that recoveries shall be diminished in proportion to the amount of negligence attributable under the *present law.*" (Emphasis added)[8] Admittedly, the legislature has acquiesced in this construction of the act by our courts.

There is some evidence, however, that the comparative negligence statute as applied does cut across other rules of law. By reviewing the development of comparative negligence it is arguable that even the Mississippi courts at times impliedly accept this proposition. The conspicuous absence of last clear chance and the very narrow application

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[2] For an example of a less pure comparative negligence law, see Ga. Code Ann. § 105-603 (1935): If the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover. In other cases the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained.

[3] *See* Peck, *Comparative Negligence and Automobile Liability Insurance,* 58 MICH. L REV. 689, 690 (1960). The other six states are: Arkansas, Georgia, Nebraska, South Dakota, Tennessee, and Wisconsin.

[4] *Id.* at 690, n. 8.

[5] *Id.* at 691.

[6] Among the types of insurance available liability, comprehensive and collision coverage for motorists is probably the most significant kind of protection offered for purposes of shifting losses due to automobile injuries.

[7] *E.g.,* FEDERAL EMPLOYER'S LIABILITY ACT, 35 STAT. 65, c. 149, § 1 (1908), 45 U.S.C. §§ 51-60 (1964); MERCHANT MARINE ACT, 41 STAT. 1007, c. 250, § 33 (1920), 46 U.S.C. § 688 (1958); 64 NEW YORK WORKMEN'S COMP. LAW. §§ 10-11 (McKinney 1965); MISS. CODE ANN. §§ 6998.04-.05 (1956).

[8] Leflar, *Comparative Negligence—A Survey For Arkansas Lawyers,* 10 ARK. L. REV. 54, 61 (1955).

of assumption of risk indicate that our courts *may* accept comparative negligence as cutting across other doctrinal lines. This note will attempt to show that the statute was intended to get an injured party's cause of action to the jury regardless of the doctrine at law invoked by the defendent for purposes of defeating plaintiff's claim. Assuming that the object of comparative negligence statutes is the "apportionment of loss among guilty parties in as nearly true a proportion to their fault as possible,"[9] we start with the premise that all such statutes are a legislative effort to relieve the harsh results obtained when the court rules as a matter of law that plaintiff's contributory negligence is a bar to any recovery. From this it is submitted that the Mississippi comparative negligence law was— and is—intended to cut across other rules of law which bar a plaintiff's recovery. The plaintiff should at least have the benefit of having his contribtuory negligence submitted to the jury to be weighed under proper instructions setting forth lawful standards of comparative fault.

II. Historical Background

Comparative negligence, or damage apportionment as it is more correctly called,[10] is a legislative response to the court's use of a rule of law popularly referred to as contributory negligence. This rule of law, first clearly announced in an early 19th century English decision,[11] holds that in order for an injured party to recover, two conditions must be met: (1) he must show fault on the part of the other party, and (2) he must have exercised ordinary care to avoid the injury at the time of the accident.

The doctrine of contributory negligence is based on the idea that when contesting parties are both negligent, the law should and will refuse to grant relief to either. The rationale is that when both parties are to some degree at fault, the court should not disturb their relative positions but leave them where their joint negligence placed them.[12] As an expression of public policy the doctrine could seemingly be used to deter future negligence conduct. It is doubtful, however, if many of Mississippi's automobile operators would be greatly influenced in their driving habits by the presence of contributory negligence as a rule of law barring injured drivers from recovery.[13]

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[9] Legislation, *Tort-Comparative Negligence Statute*, 18 VAND. L. REV. 327, 335 (1964).

[10] Prosser, LAW OF TORTS, § 66 at 448, n. 91 (3d ed. 1964).

[11] Butterfield v. Forrester, 11 East 60, 103 Eng. Rep. 926 (1809).

[12] Note, *Comparative Negligence in Pennsylvania?*, 17 TEMP. L. Q. 276, 277-78 (1943).

[13] It is imagined that if an injured party cannot collect on the basis of the other drivers' liability insurance, then he will often be able to restore his loss vis a vis comprehensive and collision coverage.

As a practical matter most drivers are concerned for their own safety and will exercise some degree of care to avoid any accident which will result in an injury to themselves. The question raised after a collision, then, is what degree of care was exercised by the drivers toward each other. If all parties stipulate that the injury is a result of an accident, then both parties must have had *some* degree of concern for the welfare of the other driver. This must follow unless the accident be termed a willful or intentional harm. It is reasoned that the drivers involved are entitled to have their respective driving habits adjudged in light of community standards under all the surrounding circumstances. Only in this way does the court address itself to the problem of restoring the parties according to their relative conduct at the time of the injury-producing event and carry out the legislative intent set forth in the Mississippi comparative negligence statute.

The courts quickly recognized that modern living conditions created problems which were not adequately dealt with by contributory negligence as a rule of law.[14] Only thirty-three years after the doctrine of contributory negligence was announced, pro-plaintiff inroads began to appear. The famous donkey case, *Davies v. Mann*[15] launched the *last clear chance* plea of plaintiff in 1842. Under this plea an injured party, though clearly contributory negligent, can still get to the jury if he can show as a matter of law that the other party had the last clear chance to avert the accident. The limitations of this escape hatch, however, were also soon recognized—notably proximate cause.[16]

As a result other rules of law were invoked by the litigants and the courts in an attempt to do justice and at the same time relieve consequent economic burdens, *e.g.*, degrees of negligence. By saying that the plaintiff's negligence was slight contrasted to the gross negligence of the defendant, the courts were able to fulfill their function. None of these attempts, however, proved to be a satisfactory expression of a judgment of comparative faults. Frequently the plaintiff was either barred from recovery or the defendant was given no benefit for the amount of plaintiff's contributory negligence. This problem was considered by the Mississippi legislature in 1910. The product of their consideration is the only *pure* comparative negligence statute of general application.[17]

Legislative History

The Senate Bill enacted into law by the Mississippi legislature in 1910 provided in part:

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[14] Note, *Comparative Negligence in Pennsylvania?*, 17 TEMP. L. Q. 276, 277-78 (1943).

[15] 10 M&W 546, 152 Eng. Rep. 588 (1842).

[16] Philbrick, *Los Apportionment In Negligence Cases*, 99 U. Pa. L. Rev. 572, 599 (1951).

[17] Legislation, *Tort-Comparative Negligence Statute*, 18 VAND. L. REV. 327, 333 (1964).

> Sec. 1. In all actions hereafter brought for personal injury or where such injuries have resulted in death, the fact that the person injured may have been guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured.
>
> Sec. 2. All questions of negligence and contributory negligence shall be for the jury to determine.[18]

Ten years later a bill was introduced in the House to amend the Act of 1910.[19] This bill, now included in section 1454 of the Mississippi Code, was the legislative response to cases which held that injury to property was not within the meaning of the original Act.[20] The property amendment, after passing the House, was introduced in the Senate and sent to the Judiciary Committee where it was amended: "Amend Sec. 1, line 9, by striking out the word 'may' and inserting in lieu thereof the word 'shall.' "[21] The effect of this alteration is unmistakable. It was apparent legislative intent that contributory negligence should not be a bar to recovery. At the same time an injured party's recovery is to be reduced in proportion to his negligent conduct. Both House and Senate gave their unanimous approval[22] to this version of the Act of 1920 without any other apparent contraversy.

Without records of speeches, committee reports and the like, it is difficult to ascertain just why Mississippi would take the lead in signing into law such radical legislation during the early 1900's. It has been suggested that perhaps some plaintiff lawyers merely put one over on the defendants.[23] However, with an eye toward current Federal legislation, *e.g.*, Federal Employer's Liability Act.[24] and other state workmen's compensation laws[25] one can speculate that it may have occurred to the legislators that passage of such a comparative negligence statute would obviate the necessity for the enactment of similar personal injury law. It can surely be argued that comparative negligence generally applied, coupled with a slower industrialization and urbanization of Mississippi, permitted our state to postpone the enactment of a more comprehensive workmen's compensation (or injured party's recovery) act until 1948.[26]

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[18] S.B. No. 133, Laws 1910, c. 135.

[19] H.B. No. 152, Laws 1920, c. 312.

[20] *E.g.*, Krebs v. Pascagoula St. R. & Power Co., 117 Miss. 771, 78 So. 753 (1918).

[21] Senate Journal, State of Mississippi at 753 (1920).

[22] House Journal, State of Mississippi at 1494 (1920); Senate Journal, State of Mississippi at 1164 (1920).

[23] Shell and Bufkin, *Comparative Negligence in Mississippi*, 27 Miss. L. J. 105 (1956).

[24] 35 Stat. 65, c. 149 § 1 (1908), 45 U.S.C. §§ 51-60 (1964).

[25] *E.g.*, 64 New York Workmen's Comp. Law, §§ 10-11 (McKinney 1965).

[26] Laws 1948, c. 354; Miss. Code Ann. §§ 6998.04-.05 (1956).

Since the statute applied to "all actions hereafter brought for personal injury,"[27] the courts were able to apportion losses arising out of the course of employment between industry and labor, or more correctly, employer-employee.[28] This was without question a big step forward and preferable to the common law of the times. On the other hand, it was much less drastic than the possibility of an almost strict liability imposed under some workmen's compensation laws. To the extent that courts were often willing to invoke some other common law defense in this field of injuries, and thereby cut off an employee's chance for recovery, the legislature was called upon to pass a more comprehensive workman's compensation law specifically abolishing assumption of risk and other doctrines at law which had the force of a complete bar to recovery.[29]

III. Comparative Negligence Applied

Observing the rather clear intent on the part of the Mississippi legislature that an injured party's *negligence* "shall not bar a recovery," it is appropriate to turn to the court's application of the statute. A brief review of Mississippi case law showing the effect of the comparative negligence statute on (1) other common law defenses, and (2) the role of the jury will provide a clearer view of the Mississippi court's *working* answer as to whether or not comparative negligence does cut across other doctrinal lines as a matter of law.

1. *Common law defenses and comparative negligence*

A. *Last Clear Chance*

As mentioned earlier the last clear chance doctrine emerged to help an injured party avoid the harsh results obtained at law when the defendant answered asserting that the plaintiff was guilty of contributory negligence.[30] Without the last clear chance plea the defendant upon a showing of sufficient evidence was granted a directed verdict as a matter of law based on his affirmative defense. Since passage of the comparative negligence statute, the last clear chance plea of plaintiff has fallen into disfavor with both counsel and the courts in Mississippi.[31]

If the literal provisions of our law are accepted, the act purports to include all actions based on a negligence theory. Sections one and two state that in *all* actions brought for personal or property injury, *all* questions of negligence and contributory negligence shall be for the jury to decide.[32] It follows that with this mandate there is no longer

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[27] LAWS 1910, c. 135; MISS. CODE ANN. § 1454 (1956).

[28] *E.g.*, Huff v. Bear Creek Mill Co., 116 Miss. 509, 77 So. 306 (1918); Sea Food Co. v. Alves, 117 Miss. 1, 77 So. 857 (1918).

[29] MISS. CODE ANN. §§ 6998.04-.05 (1956).

[30] Davies v. Mann, 10 M&W 546, 152 Eng. Rep. 588 (1842).

[31] Shell and Bufkin, *Comparative Negligence in Mississippi*, 27 MISS. L. J. 105, 110 (1956).

[32] MISS. CODE ANN. §§ 1454-55 (1956).

any need for the last clear chance doctrine. The defendant will not be given a peremptory instruction since the court is directed to let all questions of negligence and contributory negligence go to the jury. The court, of course, still determines if a jury question has been established by the parties.

Section two of the Mississippi comparative negligence statute[33] was upheld as constitutional within a year after the law went into effect. In citing a decision given by the 8th Circuit Court of Appeals, our supreme court emphatically said that section 2 "is merely declaratory of the common law."[34] Holding the statute to be within the state's police power, the court went on to say:

> The court has the power, which cannot be taken from it, to determine the legal sufficiency of the evidence as tending to establish negligence or contributory negligence. The language, 'all questions,' means questions of fact—issues of fact—are for the jury. If the evidence never reaches the point of raising issues of fact to be determined, then there is no question for the jury.[35]

Mississippi courts have in this way given support to legslative intent from the start. By holding comparative negligence to be within the police power of the state, it is reasonable to say that the courts recognized a legislative intent that an injured party's claim based on negligence theory shall not be unduly prejudiced simply by an answer that says the plaintiff was in part responsible for his own loss. The courts have admitted that they are committed to promote the welfare of the community as well as carry out the law. In keeping with this spirit Mississippi courts submit issues of negligence and contributory negligence to the jury for a determination of comparative faults of the parties.

To prevent misunderstanding the Mississippi Supreme Court has stated very clearly that the only change comparative negligence has made in the common law is that *contributory negligence* on the part of the plaintiff is no longer a bar to recovery.[36] The Court would apparently reject any contention that the comparative negligence statute cuts across other rules of law. It is not surprising to find that other rules such as assumption of risk are still good law and are invoked by both counsel and the courts on occasion.[37] Mississippi courts have thus far refused to hold or say that because a party assumed the risk, his *contributory negligence* shall not bar recovery. It is submitted that the court's very narrow and limited application of this doctrine is recognition that the comparative negligence act was intended to cut across other doctrinal lines at law which are a complete bar to recovery.

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[33] Miss. Code Ann. § 1455 (1956).

[34] Natchez & S. R. Co. v. Crawford, 99 Miss. 697, 717, 55 So. 596, 599 (1911).

[35] *Id.*

[36] *Id.*

[37] Saxton v. Rose, 201 Miss. 814, 29 So. 2d 646 (1947).

B. *Assumption of Risk*

Recent decisions of the Mississippi Supreme Court treat the doctrine of assumption of risk as if it were still a vital defense to a plaintiff's claim.[38] As stated by the court in 1947: "The common law doctrine of assumption of risk is in full force in this state except as between master and servant."[39]

In February 1967[40] the court quoted with approval an earlier opinion which, while calling attention to the distinctions between assumption of risk and contributory negligence, at the same time asserted that under our comparative negligence statute the jury was not to be denied "its right to weigh the respective negligence, if any, of the parties.[41] It appears that while the court continues to talk about assumption of risk, it is willing to let an injured plaintiff's claim go to the jury on a basis of comparative negligence. This is in keeping with section two of the act.[42] No recent cases have been found in which the court adopts this theory. Rather, the doctrine is very narrowly construed, and predictably, liability is extended in most cases.

It is questionable whether Mississippi courts today give full force and effect to assumption of risk under the comparative negligence law.[43] Although the statute is conspicuously silent as to this common law defense, the court's disposition of this class of cases can be said to imply that comparative negligence does cut across other rules of law which bar plaintiff's recovery solely on the basis of his conduct in an action for damages. In any claim the plaintiff will want to call his behavior contributory negligence while the defendant will urge that it was an assumption of the risk. The purpose is obvious. In one instance comparative negligence applies; in the other instance it does not. In fact, if assumption of risk is in full force, the plaintiff is as a matter of law handed a peremptory instruction adverse to his claim.

It seems that the spirit of the statute is promoted by the courts only if they refuse to say that the injured party assumed the risk as a matter of law. The courts must be willing to conceive of each party's conduct or activity as playing a *relative* role in the injury producing event. As the authors of the Restatement (Second) of Torts have said:

> There are statutes which make contributory negligence only a partial defense, with the effect of reducing the recoverable damages, which have been construed to leave assumption of risk as a complete defense. It would appear that, unless such a construction is clearly called for, it defeats the intent of the

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[38] *See* Dendy v. City of Pascagoula, 193 So. 2d 559 (Miss. 1967); Ideal Cement Co. v. Killingsworth, 198 So. 2d 248 (Miss. 1967).

[39] Saxton v. Rose, 201 Miss. 814, 823, 29 So. 2d 646, 649 (1947).

[40] White v. Mississippi Power & Light Co., 196 So. 2d 343 (Miss. 1967).

[41] Wallace v. J. C. Penney Co., 236 Miss. 367, 372, 109 So. 2d 876, 877-78 (1959).

[42] MISS. CODE ANN. § 1455 (1956).

[43] *See* Wade, *Some Recent Changes In the Law of Torts*, 38 MISS. L. J. 565, 572 (1967).

> statute in any case where the same conduct constitutes both contributory negligence and assumption of risk since the purpose of the act would appear to be to reduce the damages in the case of all such negligent conduct, whatever the defense may be called.[44]

It is suggested that our courts should change their position regarding assumption of risk as a complete defense and abolish the doctrine as a matter of law.[45] If it is felt that the type of conduct in this class of cases does not warrant recovery as a matter of policy choice, the spirit of comparative negligence dictates that the issue be determined by the jury under proper instructions setting forth standards of awards relative to the conduct involved.

C. *Proximate Cause*

An examination of the cases falling in this category leads to the conclusion that the plaintiff may not get to the jury on either of two grounds: (1) Failure to meet the burden of proof showing that defendant was actually guilty of negligence proximately causing his injury;[46] (2) Plaintiff's contributory negligence was the proximate cause of the injury and was of such a nature as to go to the entire cause of action, not to a mere diminution of the damages.[47] In either case, the result is the same; the plaintiff is denied the benefits of the comparative negligence statute.

The presence of the act has not changed the requirement that a plaintiff must still meet the burden of proof on the issue of defendant's negligence. Denying plaintiff recovery in an action involving a railroad, our supreme court has said:

> In order to establish the right to maintain the action, the burden is on the plaintiff to show that there was a negligent act or omission by the defendant, and that this negligence was a proximate cause of the injury, or a cause which proximately contributed to it; whereas in regard to contributory negligence, the burden of proof is on the defendant, and does not come into play at all unless the plaintiff has on his part sustained the burden as to the proximate cause.[48]

There is an exception if the plaintiff does not attempt to show defendant's negligence, but rather uses a *res ipsa loquitur* approach. Here, the plaintiff must show that he acted properly in the given situation and still suffered a loss at the hands of defendant.

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[44] RESTATEMENT (SECOND) OF TORTS, § 496A, comment d at 563 (1965).

[45] It is interesting to note that the Mississippi courts had abolished assumption of risk in employer negligence cases as a matter of law by 1918. Sea Food Co. v. Alves, 117 Miss. 1, 77 So. 857 (1918).

[46] Hughes v. W&S Const. Co., 196 So. 2d 339 (Miss. 1967).

[47] Stewart v. Kroger Groc. Co., 198 Miss. 371, 21 So. 2d 912 (1945).

[48] Thompson v. Mississippi Cent. R. Co., 175 Miss. 547, 556, 166 So. 353, 354 (1936).

In one recent case[49] the court held that if the plaintiff successfully demonstrated that he had followed defendant's directions as to the use of certain machines, a prima facie case was made by the plaintiff, and the burden of proof shifted to the defendant to prove lack of negligence proximately contributing to the loss if he were to avoid liability.

If the plaintiff can get past the proximate or legal cause hurdle, then the defendant has the burden of proof to show that plaintiff's contributory negligence was the "sole proximate cause" of the injury in order to avoid liability. If, as a matter of law, the "sole proximate cause" was plaintiff's negligence, then defendant is entitled to a peremptory instruction.[50] In any event the defendant will at least want to show that a plaintiff's activity was sufficient to be a proximate cause of the injury so that he comes within application of the act and can obtain an instruction on diminution of plaintiff's damages. The rationale is that if, as a matter of law, plaintiff's activity is not a proximate cause, then his negligence has nothing legally to do with the injury.[51] The result would seem to be that defendant is not permitted to have his judgment reduced as provided in the statute.[52]

Since *Palsgraf*[53] it is clear that proximate cause can be used to allocate liability without mentioning controlling policy reasons. It is submitted that the courts of Mississippi should stop talking in terms of proximate cause. State policy has already been expressed in our comparative negligence law, and denial of recovery to the plaintiff as a matter of law is not in keeping with the legislative intent. Comparative negligence assumes the presence of plaintiff's possible negligent behavior. No substantial reasons come to mind as to why the same conduct or activity should be labeled proximate cause other than to allocate economic loss resulting from the injury. Appellate control over trial court and jury is often advanced as a reason, but ample check exists in the court's use of a remittitur. In a recent case[54] the widow of a pedestrian struck while pushing a stalled vehicle after dark was awarded a judgment of $225,000 if she would accept a remittitur of $65,000. If she accepted, the case was affirmed as to defendant's liability for $160,000; if not, the case was reversed and remanded for a new trial on the issue of damages. Without getting lost in a maze of proximate and/or physical cause, the court by using the remittitur can impose a substantial check on the sympathy of any jury.

Why the continued use of proximate cause in negligence actions? The problem obviously is that we must assure the plaintiff all the advantages of comparative negligence while at the same time giving adequate protection to the defendant by imposing rules of law which

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[49] McManus v. Temple, 195 So. 2d 830 (Miss. 1967).

[50] C. C. Moore Const. Co. v. Hayes, 119 F.2d 742, 745 (5th Cir. 1941); *cert. denied* 314 U.S. 642 (1941).

[51] Leflar, *Comparative Negligence—A Survey For Arkansas Lawyers*, 10 ARK. L. REV. 54, 57 (1955).

[52] Herrington v. Hodges, 249 Miss. 131, 161 So. 2d 194 (1964).

[53] Palsgraf v. Long Island R. R. Co., 248 N.Y. 339, 162 N.E. 99, 59 A.L.R. at 1263 (1928).

[54] Ideal Cement Co. v. Killingsworth, 198 So. 2d 248 (Miss. 1967).

will keep an otherwise irresponsible jury in its properly functioning track.[55] Apportionment of damages under a comparative negligence statute will not always be perfect. It seems much less confusing and more in keeping with a comparative negligence scheme, however, to say which party was at fault to a greater degree than to deny plaintiff recovery as a matter of law on the grounds that he was the proximate cause.

2. *The Jury and Comparative Negligence.*

As an affirmative defense contributory negligence was required as a matter of law to be specially pleaded.[56] After the introduction of damage apportionment, however, a defendant was less likely to plead specially on a theory of comparative negligence. This followed from the fact that plaintiff's counsel often capitalized on the pleading as an admission of liability and an effort on the part of the defendant to lower the judgment. There was a very real risk that the jury might construe the pleading against the defendant.[57]

The Fifth Circuit Court of Appeals at an early date upheld defendant's right to a jury instruction on comparative negligence if he decided to make use of the act. Just as the plaintiff has a right to an instruction that contributory negligence will not bar recovery, the defendant is entitled as a matter of law to an instruction that substantial evidence in support of plaintiff's negligence will decrease his liability proportionately.[58] Where the defendant wants the benefit of diminished damages, however, he has the burden of producing sufficient evidence on the issue of plaintiff's concurrent negligence,[59] and requesting that an instruction on comparative negligence be given.[60] Failure to request such an instruction relieves the jury of any obligation to consider the issue in its award,[61] even though the evidence clearly indicates plaintiff was guilty of some negligence. Simply because the defendant does not elect to use the statute, plaintiff is not entitled to an instruction that he should be awarded full damages.[62]

If comparative negligence is not made an issue, any mitigation of damages is left to the discretion of the jury. It has been held that the

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[55] Prosser, *Comparative Negligence,* 51 MICH. L. REV. 465, 508 (1953).

[56] *Cf.* Railway Exp. Agency, Inc. v. Mallory, 168 F.2d 426 (5th Cir. 1948); Gulf & S.I.R. Co. v. Saucier, 139 Miss. 497, 104 So. 180 (1925).

[57] Note, *Torts-Mississippi Comparative Negligence Statute In Automobile Cases,* 11 MISS. L. J. 221, 223 (1938).

[58] Hudson v. Louisville & N. R. Co., 30 F.2d 391 (5th Cir. 1929).

[59] Yazoo & M.V.R. Co. v. Lucken, 137 Miss. 572, 102 So. 393 (1925); Thompson v. Mississippi Cent. R. Co., 175 Miss. 547, 166 So. 353 (1936).

[60] *Id.;* Railway Exp. Agency, Inc. v. Mallory, 168 F.2d 426 (5th Cir. 1948).

[61] Jefferson Funeral Home v. Pinson, 219 Miss. 427, 69 So. 2d 234 (1954). Where a theory of proximate cause is advanced, the jury is similarly relieved of any obligation to consider apportioning damages if it finds for the plaintiff. Mississippi Power & Light Co. v. Merritt, 194 Miss. 794, 12 So. 2d 527 (1943).

[62] Graves v. Johnson, 179 Miss. 465, 176 So. 256 (1937).

jury has such unbridled discretion even where contributory negligence is not pleaded and no instruction is given on it.[63]

In *Wilburn v. Gordon* the Mississippi Supreme Court specifically dealt with the situation where it appeared from the evidence that both parties were equally blameworthy.[64] In such a case, the court said, it is reversible error to grant defendant an instruction that if the jury finds equal fault, then it must find for the defendant. Rather, in keeping with the act, plaintiff's award should be reduced by fifty percent. The *Wilburn* rule was reaffirmed in 1954.[65] The plaintiff will not be denied recovery as a matter of law even where he is more negligent than defendant.[66]

Our courts have confined questions and instructions of comparative negligence to those cases based on some negligence theory. Where plaintiff's cause of action is grounded in some other legal doctrine, the act does not apply, and the court may decide the issue as a matter of law. In an action against a bank for damages to credit and reputation,[67] the court held it reversible error to grant defendant an instruction on comparative negligence when plaintiff's cause was in the nature of breach of contract. Predictably, then, in an action based on fraud the policy of comparative negligence has no application.[68]

IV. Conclusions

The main objection to contributory negligence as a bar to recovery is that the reason for its existence is no longer valid. Enunciated by the courts at the inception of the industrial revolution, a time when liability insurance was unknown and no other method of spreading industrial risks had yet been devised, the doctrine was frequently invoked as a matter of law to protect negligent corporations which most juries were inclined to treat differently than individual defendants.[69] With today's pricing practices, cost accounting techniques, and widespread use of liability insurance, it seems unfair to place the entire burden of loss on either of the parties where both have contributed to the act which produced plaintiff's injury.

The Mississippi act provides broad relief to the plaintiff. As discussed, it has general application to all actions for personal injury or property loss, and section two of the act requires that all questions of negligence and contributory negligence be sent to the jury. Case law indicates that proof of defendant's last clear chance is no longer essential, and that assumption of risk is so narrowly applied it has lost most of

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[63] Goodman v. Lang, 158 Miss. 204, 130 So. 50 (1930); *See* Malone, *Torts and Negligence*, 11 Miss. L. J. 76, 82 (1938).

[64] 209 Miss. 27, 45 So. 2d 844 (1950).

[65] Carruth v. Griffis, 220 Miss. 541, 71 So. 2d 478 (1954).

[66] Yazoo & M.V.R. Co. v. Carroll, 103 Miss. 830, 60 So. 1013 (1913); Crosby Lumber & Mfg. Co. v. Durham, 181 Miss. 559, 179 So. 285; *suggestion of error overruled*, 151 Miss. 559, 179 So. 854 (1938).

[67] Weaver v. Grenada Bank, 180 Miss. 876, 179 So. 564 (1938).

[68] Reed v. Charping, 207 Miss. 1, 41 So. 2d 11 (1949).

[69] *See* Legislation, *Tort-Comparative Negligence Statute*, 18 VAND. L. REV. 327 (1964).

its vitality. The remaining hurdle for the plaintiff in Mississippi is proxmate cause. Our courts continue to employ this legal doctrine to allocate liability in spite of the comparative negligence statute.

The positive features of the Mississippi comparative negligence law are negated to the extent that the courts are willing to deny recovery simply because the defendant succeeds in appending the label of assumption of risk or sole proximate cause to plaintiff's conduct rather than contributory negligence. Unlike other recovery laws[70] the comparative negligence act does not expressly abolish these other common law defenses. As already suggested, distinctions between these various categories of plaintiff's role in the injury producing event are at best tenuous.

Consistent with the premise that comparative negligence seeks "apportionment of loss among guilty parties in as nearly true a proportion to their fault as possible,"[71] such legal niceties should be discarded. The conduct of each litigant should be subject to common comparative standards. Gross negligence of either party, even if the *sole proximate cause,* should be subject to comparison or contrast under proper jury instructions on the same basis as ordinary negligence.[72] One state, Wisconsin, has made progress in this respect as it has abolished both assumption of risk[73] and gross negligence.[74] There appear to be no sig-

[70] *E.g.,* WORKMEN'S COMP., MISS. CODE ANN. §§ 6998.04.-05 (1956).

[71] Legislation, *Tort-Comparative Negligence Statute,* 18 VAND. L. REV. 327, 335 (1964).

[72] See a very strong dissenting opinion in Thompson v. Mississippi Cent. R. Co., 175 Miss. 547, 564, 166 So. 353, 357 (1936) where Justice Ethridge said:

> This [comparative negligence] statute is applicable . . . because, . . . the jury had a right to believe that both parties were negligent, and there was a causal connection between the negligence of the railroad company and the death of the driver of the automobile. It was the intention of the Legislature . . . to leave to the jury the determination of the question of negligence, where there was proof in the case that would warrant the jury in finding either simple or gross negligence.

[73] McConville v. State Farm Mut. Auto Ins. Co., 15 Wis. 2d 374, 113 N.W.2d 14 (1962).

[74] Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105, 111-113 (1962). Excerpts from this well reasoned opinion follows:

> The history of the development of gross negligence, its reason for existing, the content of the concept, and the inequitable results and consequences of its application have led us to decide the doctrine of gross negligence, as we know it, should be interred in the limbo of jurisprudence alongside the doctrine of assumption of risk in . . . negligence cases.
>
> The doctrine of gross negligence as a vehicle of social policy no longer fulfills a purpose in comparative negligence. Much of what constituted gross negligence will be found to constitute a high percentage of ordinary negligence causing the harm. Obviously, we are stressing the basic goal of the law of negligence, the equitable distribution of the loss in relation to the respective contribution of the faults causing it.
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> Only by abolishing the present concept of gross negligence and considering such conduct as ordinary negligence and treating it in terms of degree on a comparative basis can an equitable and fair result be reached in all cases.

nificant reasons why Mississippi cannot follow Wisconsin's lead and expressly do away with such common law remnants either by legislative enactment or court pronouncement. This is particularly true since our law does not require that the plaintiff's negligence must be less than defendant's for recovery.

Taking the approach of the Wisconsin courts, it is submitted that the the doctrine of proximate cause no longer fulfills a purpose within the legislative scheme of recovery allowed by the Mississippi comparative negligence statute. Analogous to the situation of gross negligence, it is reasoned that much of what constitutes proximate cause will be *found to constitute a high degree of ordinary contributory negligence* causing an injury. Section two of the act, however, requires that all issues of negligence and contributory negligence be decided by the jury. As the Wisconsin court has said: "Obviously, we are stressing the basic goal of the law of negligence, the . . . distribution of the loss in relation to the respective contribution of the faults causing it."[75]

Objections, nonetheless, have also been made of comparative negligence statutes. Practical criticisms aimed at these laws are based on a concern for the frequency of claims and added burden upon the courts resulting from a litigation scheme making possible recoveries otherwise barred by contributory negligence.[76] Concern is also expressed over the likelihood of increased insurance rates.[77]

Opposing views have been expressed. One side says that the Mississippi act has increased the number of claims and the amount of settlements and judgments.[78] Another authority says that comparative negligence has not drastically affected the size or quality of the court's burden in processing cases.[79] Whether or not there is a greater burden imposed upon the courts is beyond the scope of this article. As for insurance rates, the author of a Michigan study in 1960 says that generally "*no* effect from comparative negligence appears in the data collected. . . ."[80] As a matter of fact, he concludes, comparative negligence probably has less effect on insurance rates than the rapid growth of population and increased urbanization.[81]

Evaluating Mississippi's approach, we have fortunately avoided some of the pitfalls experienced by other states with a less pure act. As noted earlier, our legislature did not dilute the potential effectivness of the law by inserting a requirement that plaintiff's negligence must be less than

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[75] *Id.*, 114 N.W.2d at 113.

[76] Peck, *Comparative Negligence and Automobile Liability Insurance*, 58 MICH. L. REV. 689, 691 (1960).

[77] *Id.*

[78] Gilmore, *Comparative Negligence From A Viewpoint of Casualty Insurance*, 10 ARK. L. REV. 82, 83 (1955).

[79] Peck, *Comparative Negligence and Automobile Liability Insurance*, 58 MICH. L. REV. 689, 705, 709, 726 (1960) citing Rosenberg, *Comparative Negligence in Arkansas: A "Before and After" Survey*, 13 ARK. L. REV. 89, 108 (1959).

[80] *Id.* at 726.

[81] *Id.* at 728.

the defendant's.[82] It has been said that our statute promotes consistency, cuts down on the number of appeals, and generally fosters the spirit of comparative negligence by eliminating this possible source of injustice found in the limited or impure statute.[83] Our supreme court has always stressed that it will not distinguish degrees of negligence, and that no amount of contributory negligence will bar plaintiff's recovery.[84] As a matter of law, however, the supreme court will occasionally examine plaintiff's negligence relative to that of defendants. If it believes that too large a judgment was awarded, it will order a remittitur. The plaintiff thereby receives the benefit of comparative negligence, and the law will do justice since "damages *shall* be diminished . . . in proportion to the amount of negligence attributable to the person injured."[85] (emphasis added).

Suggestions have been made for the improvement of comparative negligence in practice. Obviously, the acceptance of these ideas is a matter of policy choice. In harmony with the thrust of this kind of legislation, it is submitted that (1) comparative faults be the standard of judgment applied; (2) proximate cause be used only in its factual sense and as a standard to determine that each party's conduct was a substantial factor leading to the injury; and, (3) the imposition of liability by a jury be subject to necessary controls as a matter of law, *e.g.*, special verdicts as used under the Wisconsin law,[86] the remittitur used by our own supreme court as early as 1917,[87] and granting of a new trial on the issue of damages only.[88] The allocation of contemporary social liability in terms of proximate cause or assumption of risk only confuses a muddy area of the law which often calls for difficult decision making. Nonetheless, decisions must be made in an acceptable manner by a forum within the law.

William H. McMullen, Jr.

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[82] *E.g.*, S. D. CODE § 47.0304-1 (Supp. 1960): "In all actions . . . the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison . . ."; WIS. STAT. ANN. § 331.045 (West 1958): "Contributory negligence shall not bar recovery in an action . . . if such negligence was not as great as the negligence of the person against whom recovery is sought . . . ."

[83] Legislation, *Tort-Comparative Negligence Statutes*, 18 VAND. L. REV. 327, 334 (1964).

[84] Yazoo & M.V.R. Co. v. Carroll, 103 Miss. 830, 835, 60 So. 1013, 1014 (1913).

[85] MISS. CODE ANN. § 1454 (1956).

[86] WIS. STAT. ANN. § 270.27 (1957); *see* J. Wade, *Some Recent Changes in the Law of Torts*, 38 Miss. L. J. 565, 570-71 (1967), an address before the Third General Assembly of Mississippi State Bar, July 1967.

[87] Yazoo & M.V.R. Co. v. Williams, 114 Miss. 236, 74 So. 835, (1917).

[88] MISS. CODE ANN. § 1536 (1956). *See also* Dendy v. City of Pascagoula, 193 So. 2d 559, 564 (Miss. 1967) and Houston v. Page's Supermarket, — So. 2d — (Miss. 1968).

JUVENILES—THE CHILD, MEDICINE AND THE LAW

In recent years the need for protection of innocent children from the abuse or neglect of their parents, guardians, or custodians has been brought to the attention of the public by the mass media, especially the press. Two of the most common reasons for such abuse are the denial of medical attention to children because of the religious beliefs of their parents and the physical injury of children at the hands of their parents. This article will deal specifically with these two areas and will examine the causes of the abuse, the theories of regulation, and the remedies available at both the state and local levels.

I. Compelled Medical Treatment and Religious Freedom

"The right to practice religion freely does not include the liberty to expose the community or the child to communicable disease or the latter to ill health or death."[1]

In examining the problems of children who are denied medical treatment because of the religious beliefs of their parents, it is necessary to look closely at the interests which must be balanced and to explain the theories of regulation available to the authorities for controlling such abuses.

Under the English common law it was a misdemeanor for a parent not to furnish his children the necessities of life. This included lodging, food, drink, clothing, or 'physic.' If the parent neglected his child and this neglect resulted in the death of the child, then the parent was guilty of involuntary manslaughter. But there was no provision covering the situation where a parent did the best he could to provide for the child and in good faith chose faith and prayer instead of a medical practitioner to heal his child. There was no criminal intent nor was the negligence considered so gross as to be criminal.[2]

This situation changed in 1868 with the passage of the Poor Law Amendment Act which made it a misdemeanor for a parent willfully to neglect to provide necessary medical aid for his child.[3] The 1899 case of *Regina v. Senior*[4] is the leading English decision on the question of the denial of medical aid to a child because of the religious beliefs of the parent. Lord Russell in his opinion said:

> At the present day when medical aid is within the reach of the humblest and poorest members of the community, it cannot reasonably be suggested that the omission to provide medical aid for a dying child does not amount to neglect.[5]

This decision brought medical aid within the purview of the Prevention of Cruelty to Children Act of 1894, the language of which did not specifically mention medical aid.[6] Similar child protection statutes

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[1] Prince v. Massachusetts, 321 U. S. 158, 167 (1944).

[2] 21 Am. & Eng. (Eac.) Law 199.

[3] § 37 Poor Law Amendment Act (1868).

[4] 1 Q. B. 283.

[5] *Id.*

[6] Prevention of Cruelty to Children Act of 1894, 57 & 58 Vict., c. 41.

have been enacted in all U.S. jurisdictions, and all states appear to be able to take custody of a child where the situation demands prompt attention for the general welfare of the child.[7]

Two theories of regulation have generally been held to be sufficient to meet the various constitutional standards. They are the police power of parens patriae.

The police power of a state can be used to regulate the general welfare and preserve the public order.[8] It has been exercised by various states to regulate such matters as the practice of bigamy for religious reasons,[9] the distribution of religious literature,[10] compulsory vaccination,[11] and snake handling in religious ceremonies.[12] There are limits upon the use of a state's police power. As a general rule the exercise of such power must deal with rights which inhere in the public as a whole in order to justify interference with those rights granted to the individual,[13] and the governing entity must not act arbitrarily to deprive an individual citizen of a right to which he is entitled.[14]

"Under the doctrine of 'parens patriae' a state has the soverign power of guardianship over persons of disability such as minors and incompetent persons".[15] The early cases justified the use of this doctrine by relying on the standard of clear and present danger that had been developed in the area of freedom of speech.[16] Much criticism developed because there was an open question as to whether tests appropriate for regulating speech were applicable in the area of religious freedom. There is a strong argument which attributes the upholding of religious freedom in the case of *West Virginia Bd. of Educ. v. Barnette*[17] to Mr. Justice Jackson's "begin to affect" doctrine. This was a more rigid test than the clear and present danger test, but it did not obscure the process of balancing values and interests.[18] This doctrine seems to have laid the groundwork for the recent formulation of the Supreme Court in *Sherbert v. Verner*[19] which held that indirect burdens on the free exercise of religion could be justified because of a "compelling state interest in the regulation of a subject within the state's constitutional power to regulate".[20] The Court added, however, that "only the gravest abuses,

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[7] See, DeFrancis, *Child Abuse—The Legislative Response*, 44 Den. L. J. 3 (1967).

[8] Tighe v. Osborn, 149 Md. 349, 131, A. 801, 803 (1925).

[9] Reynolds v. United States, 98 U.S. 145, 166 (1878).

[10] City of Manchester v. Leiby, 117 F.2d 661 (1st Cir. 1941), *cert. denied*, 313 U.S. 562 (1941).

[11] Cude v. State, 237 Ark. 927, 377 S.W.2d 816 (1964).

[12] Harden v. State, 188 Tenn. 17, 216 S.W.2d 708 (1948).

[13] Neef v. City of Springfield, 380 Ill. 275, 43 N.E.2d 947 (1942).

[14] Burley v. City of Annapolis, 182 Md. 307, 34 A.2d 603 (1943).

[15] Arnold v. Arnold, 246 Ala. 86, 18 So. 2d 730, 734 (1944).

[16] Schench v. United States, 249 U.S. 47 (1918).

[17] 319 U.S. 624, 639 (1942).

[18] Note, *Court Authorization of Blood Tranfusion to Patient Whose Religious Beliefs Prohibit the Acceptance of Blood Violates His Freedom of Religion*, 44 Texas L. Rev. 190 (1965).

[19] 374 U.S. 398 (1963).

[20] *Id.* at 403.

endangering paramount interests, give occasion for permissible regulation.[21] There is some question as to whether the court rejected the "clear and present danger" test here or merely substituted the "endangering paramount interest" test in its place. Whichever test is applied is of little concern, however, because either is a sanction of the state's power to regulate the practice of religion by "parens patriae" when the situation calls for such regulation.

Regulations by the state in this area have generally been aimed at three groups: faith healers, Jehovah's Witnesses, and Christian Scientists. True faith healers undertake to treat injury and disease solely by prayer; they deny themselves and their children all the protection and benefit of modern medical knowledge and treatment. Jehovah's Witnesses are not true faith healers at all, but deny themselves certain medical treatment, chiefly blood transfusions,[22] because such acts go against their religious beliefs based on portions of the Bible which forbid the "eating of blood."[23]

Christian Scientists can be placed in almost the same category as faith healers except that their religion does not require refusal of all medical treatment ". . . where medical treatment for minor children is required by law, Christian Scientists are, as always, strictly obedient to the requirement; but in such areas they seek eventual recognition by law of their right to rely wholly on Christian Science healing for themselves and their children. . . ."[24] The legislatures of every state have recognized or approved Christian Science practices.[25] Various methods of controlling the results of these groups have already been discussed, but what of the groups themselves? The Mississippi statute for instance says plainly that a child will not be considered "neglected" or "battered" solely because it is under the treatment of a recognized religious practitioner.[26] The state will step in and require that a child be given proper medical treatment if it can be shown that such action is necessary for the health and welfare of the child and if such cases can be discovered.

Today's medical practice acts almost universally except from the licensing requirements those persons who endeavor to treat human ailments exclusively by prayer or spiritual endeavors. Therefore, spiritual healers are usually within their rights when they hold themselves out to the parents of children as proper healers. If their ministrations fail and the child should die, only the parent of the dead child has to go to court, while the faith healer who advertised and probably urged the parent to trust in his methods goes free.[27] The fact is that as long as

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[21] *Id.* at 406.

[22] United States v. George, 239 F. Supp. 752 (D. Conn. 1965).

[23] Genesis 9:3 "Every moving animal that is alive may serve as food for you. As in the case of green vegetation, I do not give it all to you. Only flesh with its soul—its blood—you must not eat."

[24] Christian Science Committee of Publication, *Facts about Christian Science* 10 (1959) as cited in Note, *Compulsory Medical Treatment and the Free Exercise of Religion*, 42 Ind. L. J. 386 (1967).

[25] See, Miss. Code Ann. § 7185-02 (Supp. 1966).

[26] Miss. Code Ann. § 7185-02 (Supp. 1966).

[27] Cawley, *Criminal Liability in Faith Healing*, 39 Minn. L. Rev. 48 (1955).

the activity is confined to prayer and spiritual means, a single healer or a corporate entity such as the Christian Science church is free to practice a profitable profession on children as well as adults.[28]

Thus, while strides are being made in the area of protection of children whose parents deny them medical aid because of their own religious beliefs, there needs to be an assessment of the laws which apply to the unauthorized practice of medicine.

Mississippi has recognized the religious problem. The courts have not been called upon to deal directly with a child who has been denied medical treatment because of the religious beliefs of his parents, but the issue was brought before the court in the 1951 case of *Eggleston v Landrum*.[29] In that case an adoption was challenged on the grounds that the adopting parents were members of the Christian Science Church, and because of their religious beliefs, they would not afford the child proper medical attention if the need for it were to arise. The court recognized the power of the state to remove a child from the custody of its parents if the best interests of the child demand it. Justice Lee said:

> There can be no doubt, under the doctrine of parens patriae, that the state has the sovereign power of guardianship over persons of disability. . . . To insure the best interest of the child, the power of the State transcends the rights of natural parents; and if they are unfit to have the custody, their children may be taken from them.
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> . . . necessary surgical and medical care falls into the same category as necessary subsistence; and a child, who is not supplied with such care, becomes neglected within the meaning of our law; and penalties may be imposed against parents who omit the performance of their duty in such respect.
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> . . . an enlightened society will not permit the great healing medium of modern medicine and surgery to be denied to children, regardless of the conscientious belief of their parents. . . ."[30]

The law that Justice Lee referred to in his opinion is § 7185-02 of the Mississippi Code of 1942 which defines as "neglected" any child who is not afforded "necessary care or support, or education as required by law or medical, surgical or other care necessary for his well being." Any parent who contributes to the neglect of a child is guilty of a misdemeanor and is subject to the punishment for such offense.[31]

From the Eggleston opinion and the statutes it can be seen that Mississippi has recognized the problem of medical neglect of a child and is prepared to correct such a situation should it arise. Members of the bar must be aware of the remedies available should they have the opportunity to handle such a case. Not only can the child be taken out of the custody of his parents and provided proper medical care, but the

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[28] *Id.* at 67.

[29] 210 Miss. 645, 50 So. 2d 364 (1951).

[30] *Id.* at 366, 367.

[31] Miss. Code Ann. § 7185-13 (Supp. 1966).

parents can be punished under the statute. It should be noted, however, that § 7185-02 further states that; "No child who in good faith is under treatment by spiritual means alone through prayer in accordance with the tenets and practice of a recognized church or religious denomination by a duly accredited practitioner thereof shall for this reason alone, be considered to be medically neglected under any provision of this act."[32] Thus, a showing of something more than mere spiritual treatment is necessary before a remedy may be he had under the act. It is submitted that a doctor's statement that the condition of the child is due to the neglect or refusal of his parents to provide him with proper medical treatment would be sufficient to satisfy the statutory requirement.

Mississippi's licensing statutes do not require that a spiritual healer have a license to be able to practice.[33] It would appear that as long as such a healer remains within the tenets of a recognized church or religion denomination and is a duly accredited practitioner of such, then he is within the law and can continue to practice.[34] There are faith healers, Jehovah's Witnesses, and Christian Scientists in Mississippi. Cases of this nature are sure to arise. The legislature and the courts have paved the way for dealing with such situations and the remedies available should be relied upon with confidence.

The statutes in Mississippi which concern the "Battered" child also provide for children who are "neglected" and the statutory definition of a neglected child includes any child who is denied medical care necessary for his well being. A doctor who learns of a child who is being denied proper medical treatment because of the religious beliefs of his parents can report directly to the family or youth court judge or to the district or county attorney. This report sets the remedial machinery into action and the child can be removed from his parents and provided the proper medical treatment if the judge feels that it is necessary for the health and safety of the child.

II. The Battered Child

An almost universal reluctance to believe that many parents are capable of injuring or seriously mistreating their own children has been dispelled to a great extent within the last five years by reports and articles written by medical personnel, social workers, and newspaper reporters which have identified large numbers of cases where such abuse has occurred. In response to the general outcry against such abuses every state legislature except Hawaii has passed a reporting law[35] to facilitate the discovery and solution of cases of child abuse. These statutes are commonly referred to as "Battered Child" statutes and provide protection to children who have had physical injury inflicted on them by their parents, guardians or custodians.

Medical awareness of the physically abused child has been a slow process since physicians were reluctant to believe that parents would

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[32] MISS. CODE ANN. § 7185-02(h) (Supp. 1966).

[33] MISS. CODE ANN. §§ 8878-8893 (1956).

[34] MISS. CODE ANN. § 7185-02(h) (Supp. 1966).

[35] ALA. CODE tit. 27, §§ 21-25 (Supp. 1966): ALASKA STAT. §§ 11.67.010-.070

intentionally injure their own children. In particular, young physicians, interns, and residents who were in the best positions to discover cases of child abuse because of their work in charity hospitals and emergency wards, were slow to point an accusation at a parent either because of fear of the results or because of a reluctance to believe that such abuse was actually happening.[36] For these reasons questionable injuries to small children were usually attributed to unrecorded accidental injuries or the trauma of birth. Awareness finally came because of numerous reports of repeated injury to infants without a history of trauma sufficient to support such injury.[37] The reports led to studies, surveys, and research which resulted in a comprehensive article entitled *The Battered-Child Syndrome*[38] which was published in the JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION in July 1962. This important work began with the following paragraph:

(Supp. 1965); ARIZ. REV. STAT. ANN. § 13-842.01 (Supp. 1966); ARK. STAT. ANN. §§ 42-801-806 (Supp. 1965); CAL. PEN. CODE § 11161.5 (West Supp. 1966); § 38 a (Supp. 1965); FLA. STAT. ANN. ch. 50 § 828.041 (1965); GA. CODE ANN. COLO. REV. STAT. ANN. §§ 22-13-1 to -7 (1963); CONN. GEN. STAT. ANN. tit. 17, § 74-111 (Supp. 1965); IDAHO CODE ANN. §§ 16-1624-1643 (Supp. 1965); ILL. ANN. STAT. ch. 23, §§ 2041-47 (Smith-Hurd Supp. 1965); IND. ANN. STAT. §§ 52-1419-1425 (Supp. 1965); KY. REV. STAT. ANN. § 199.335 (Supp. 1966); LA. REV. STAT. ANN. § 14:403 (Supp. 1965); ME. REV. STAT. ANN. tit. 22, §§ 3851-55 (Supp. 1966); MD. LAWS ch. 221, § 1 [1966]; MASS. ANN. LAWS ch. 119 §§ 39A-B (1965); MICH. STAT. ANN. §§ 14,564(1)-(5) (Supp. 1965); MINN. STAT. ANN. § 626.554 (Supp. 1965); MISS. CODE ANN. §§ 7185-02-16 (Supp. 1966); MO. ANN. STAT. § 210.105 (Supp. 1966); MONT. REV. CODES ANN. §§ 10-901-905 (Supp. 1965); NEB. REV. STAT. §§ 28-481-484 (Supp. 1965); NEV. REV. STAT. §§ 200.501-507 (Supp. 1965); N. H. REV. STAT. ANN. §§ 571:25-:30 (Supp. 1965); N. J. STAT. ANN. §§ 9:6-8.1-8.7 (Supp. 1966); N. M. STAT. ANN. §§ 13-9-12-16 (Supp. 1965); N. Y. SOC. WEL. LAW § 383-b (McKinny 1967); N. C. GEN. STAT. §§ 8-53.01, 14-318.2, 14-318.3 (Supp. 1965); N. D. CENT. CODE § 50-25-01-05 (Supp. 1965); OHIO REV. CODE ANN. § 2151-421 (Baldwin Supp. 1966); OKLA. STAT. ANN. tit. 21, §§ 845-48 (Supp. 1966); ORE. REV. STAT. §§ 146.710-.990 (1965); PA. STAT. ANN. tit. 18, § 4330 (Supp. 1965); R. I. GEN. LAWS ANN. §§ 40-13.1-1-6 (Supp. 1965); S. C. CODE ANN. §§ 20.302.1-302.4 (Supp. 1965); ch. 90, §§ 1-2 [1964] S. D. SESS. LAWS 123; TENN. CODE ANN. §§ 37-1201-1207 (Supp. 1966); TEX. REV. CIV. STAT. art. 695c-2, to -6 §§ 1-3 (Supp. 1966); UTAH CODE ANN. §§ 55-16-1 (Supp. 1965); VT. STAT. ANN. tit. 13, ch. 26, §§ 1351-55 (Supp. 1965); VA. CODE ANN. §§ 63-307.1-307.4 (Supp. 1966); WASH. REV. CODE ANN. §§ 26.44.010-.060 (Supp. 1966); W. VA. CODE ANN. § 48.981 (Supp. 1966); WYO. STAT. ANN. §§ 14-28.1-28.6 (1965). All general references to statutes herein refer to the statutes as cited above.

[36] Comment, *Legislation as Protection for the Battered Child*, 12 VILL. L. REV. 313 (1967).

[37] *See*, Woley & Evans, *Significance of Skeletal Lesions in Infants Resembling Those of Traumatic Origin*, 158 A.M.A.J. 539 (1955) as cited in 12 VILL. L. REV. 314 (1967).

[38] Kempe, Sivlerman, Steele, Droegemueller and Silver, *The Battered-Child Syndrome*, 181 A.M.A.J. 17 (1962).

> The battered-child syndrome is a term used by us to characterize a clinical condition in young children who have received serious physical abuse, generally from a parent or foster parent. The condition has also been described as "unrecognized trauma" by radiologists, orthopedists, pediatricians, and social service workers. It is a significant cause of childhood disability and death. Unfortunately, it is frequently not recognized or, if diagnosed, is inadequately handled by the physician because of hesitation to bring the case to the attention of the proper authorities.[39]

The seriousness of the problem the battered child presents can be illustrated by the types of injuries which result from beatings inflicted by bare fists, hairbrushes, straps, rubber hoses, electric cords, and baseball bats.[40] The injuries include bruises, contusions, welts, broken arms, legs, and ribs. Thus, it can be seen that the medical awareness of the problem developed from reports describing the injuries and discovery of their cause. The next step logically is from the awareness of the problem to the solution of it. It is in this stage that state legislatures have stepped in and passed the various reporting statutes making the problem both a medical and legal one. These statutes serve the important function of bringing the problem before public agencies with the power to take positive action to bring about a swift solution. They are designed to overcome several problems which have hindered the discovery, reporting, and solution of cases involving a battered child.

Diagnosis of an intentional battering is difficult because it requires a physician to go beyond his usual noting of a physical condition and attempt to discover the intent and motive of the offender. This type of diagnosis is foreign to a physician's training and usual conduct, and therefore he is reluctant to attempt it.[41] Many doctors have regarded reporting as a breach of the physician-patient privilege, while others have failed to report suspected cases of abuse because they did not know to whom to report or because they had no reason to believe that the reporting would benefit the child.[42] There also has been fear of liability on the part of the physician because an erroneous report of a case of child abuse could lead to an action against the physician for defamation,[43] invasion of privacy,[44] or breach of confidential relationship.[45] For these reasons it is necessary to have strong reporting statutes that provide protection to the physicians, an easy method of reporting, and enforcement powers in the proper agencies. The Children's Bureau of the Department of Health, Education, and Welfare drafted model

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[39] *Id.*

[40] De Francis, *Child Abuse, Preview of a Nation-wide Survey* (1963). See also, 12 VILL. L. REV. 313 (1967).

[41] McCoid, *The Battered Child and Other Assaults Upon the Family*, 50 MINN. L. REV. 1, (1965).

[42] Bain, Milowe, Wenger, Fairchild and More, *Child Abuse and Injury*, 130 MIL. MED. 747 (1965); as cited in 12 VILL. L. REV. 313, 317 (1967).

[43] W. Prosser, TORTS § 106 at 756 (3d ed. 1964).

[44] *Id.* at 834.

[45] *Id.* at 810.

legislation to encourage and assist states in enacting such statutes.[46] The response of the legislatures has already been noted, but there are differences in the various statutes and difficulties have arisen as to what should or should not be included in the acts. These differences and difficulties can best be discussed by examining Mississippi's newly enacted statute and by comparing it to the corresponding statutes of other states.

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[46] Children's Bureau, U.S. Dep't of Health, Education and Welfare, *The Abused Child—Principles and Suggested Language for Legislation and Reporting of the Physically Abused Child.* Reproduced also in McCoid, *The Battered Child and Other Assaults Upon the Family* (pt. 1); 50 MINN. L. REV. 1, 20 (1965); 12 VILL. L. REV. 313 (1967).

1. Purpose. The purpose of this Act is to provide for the protection of children who have had physical injury inflicted upon them and who are further threatened by the conduct of those responsible for their care and protection. Physicians who become aware of such cases should report them to appropriate police authority thereby causing the protective services of the State to be brought to bear in an effort to protect the health and welfare of these children and to prevent further abuses.

2. Reports by Physicians and Institutions. Any physician, including any licensed doctor of medicine, licensed osteopathis physician, intern and resident, having reasonable cause to suspect that [a] child under the [maximum age of juvenile court jurisdiction] brought to him or coming before him for examination, care or treatment has had serious physical injury or injuries inflicted upon him other than by accidental means by a parent or other person responsible for his care, shall report or cause reports to be made in accordance with the provisions of this Act; provided that when the attendance of a physician with respect to the child is pursuant to the performance of services as a member of the staff of a hospital or similar institution he shall notify the person in charge of the institution or his designated delegate who shall report or cause reports to be made in accordance with the provisions of this Act.

3. Nature and Content of Report: to Whom Made. An oral report shall be made immediately by telephone or otherwise, and followed as soon thereafter as possible by a report in writing, to an appropriate police authority. Such reports shall contain the names and addresses of the child and his parents or other persons responsible for his care, if known, the child's age, the nature and extent of the child's injuries (including any evidence of previous injuries), and any other information that the physician believes might be helpful in establishing the cause of the injuries and the identity of the perpetrator.

4. Immunity from Liability. Anyone participating in good faith in the making of a report pursuant to this Act shall have immunity from any liability, civil or criminal, that might otherwise be incurred, or imposed. Any such participant shall have the same immunity with respect to participation in any judicial proceeding resulting from such report.

5. Evidence not Privileged. Neither the physician-patient privilege nor the husband-wife privilege shall be a ground for excluding evidence regarding a child's injuries or the cause thereof, in any judicial proceeding resulting from a report pursuant to this Act.

6. Penalty for Violation. Anyone knowingly and willfully violating the provisions of this Act shall be guilty of a misdemeanor.

The new "Battered Child" statutes[47] in Mississippi were passed in 1966 as amendments to the youth court act of 1946. The amendments extend the protections provided "delinquent" and "neglected" children by the 1946 act to Battered Child situations and provide means of reporting, solving, and punishing in such cases.

A "Battered Child" as defined by the statute is "a child whose parent, guardian, or custodian, or any person legally responsible for his care or support has inflicted serious physical injury or injuries other than by accidental means upon him as a result of abuse or neglect."[48] The county youth court has original jurisdiction in all proceedings concerning any "Battered Child,"[49] but it is a court of limited jurisdiction and the facts showing its jurisdiction must appear in its orders.[50]

Section 7185-05 outlines the procedure which should be followed in instituting an action. It provides that "any person" who has reason to believe that a child comes within the purview of the act may file a report and it places a *duty* to report on licensed doctors of medicine and dentistry, interns, residents, and registered nurses who have "reasonable cause to suspect" that a child brought to him or coming before him for examination, care, or treatment is a battered child.

This section also contains the "reporting" segment of the statute which requires that an oral report issue immediately, followed by a report in writing to the person designated by the judge of the county youth court or family court and to the county welfare department. The report must contain the names and addresses of the child and his parents or other persons responsible for his care, and, if known, the child's age, the nature and extent of the child's injuries (including any evidence of previous injuries), and any other information that might be helpful in establishing the cause of the injury and the identity of the perpetrator.[51]

After a report is received the court may make a preliminary inquiry to determine whether the interest of the child or the public requires the court to take further action. During the pendency of the inquiry the judge may request that a youth counsellor or the county Department of Public Welfare make a social investigation of the case and present its findings to the court. This provides a method of informal adjustment that might benefit the child or solve the problem without having to resort to a formal petition. If the court feels that further legal action is necessary, it may then authorize a petition to be filed by a youth counsellor, county or district attorney with the clerk of the youth court.[52] No child may be committed to any institution or agency without first having a hearing upon such petition.[53]

Any licensed doctor of medicine or dentistry, intern, resident, registered nurse, or hospital who files a report or participates in a legal

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[47] MISS. CODE ANN. §§ 7185.02-7185.26 (Supp. 1966).

[48] MISS. CODE ANN. § 7185-02 (Supp. 1966).

[49] *But see,* MISS. CODE ANN. § 7185-03 (Supp. 1966).

[50] Monk v. State, 238 Miss. 658, 116 So. 2d 810 (1950).

[51] MISS. CODE ANN. § 7185-05 (Supp. 1966).

[52] *Id.*

[53] *Id.*

action resulting from a petition is presumed to be acting in good faith and is therefore immune to any civil or criminal liability which might otherwise be incurred.[54] This is an important segment of the statute because it removes the reporter's fear of retaliation by the accused parent, guardian, or custodian.

The amended section 7185-13 makes it a misdemeanor to contribute to or participate in any act which tends to "batter" any child.[55] It also provides for the admission of the physician's testimony over any objection that such testimony violates the physician-patient privilege, similar privilege, or rule against disclosure in any proceeding resulting from a report made pursuant to the statute. The language of the statute seems to point toward a similar waiver of the husband-wife privilege or the parent-child privilege if such testimony is needed. The fact that spousal privileges are waived in other types of actions in Mississippi by section 1689 of the code lends credence to this contention.

Mississippi is one of twenty-four states which includes a purpose clause in its statute.[56] All of these clauses say substantially the same thing though the actual wording varies. They all provide for the protection of children who have had physical injury inflicted upon them. The purpose of the statutes in those states without an actual purpose clause can be determined from the procedures which they prescribe for remedying the problems concerning the battered child.[57]

For a child to come within the scope of the Mississippi statute he must be under eighteen years of age. This is a logical limit since there is no doubt about the jurisdiction of the youth court in cases concerning children aged ten through eighteen provided they otherwise come within the purview of the statute.[58] Age limits differ from state to state, but the differences can usually be attributed to the disparity of age limits for youth court jurisdiction in the various states.[59] Four states, Colorado, Georgia, Missouri, and Oregon, set the upper age limit at

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[54] *Id.*

[55] Miss. Code Ann. § 7185-13 (Supp. 1966).

[56] Miss. Code Ann. § 7185-26. Other states with purpose clauses are: Arkansas, Colorado, Delaware, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oklahoma, Rhode Island, Utah, Vermont, Washington, and West Virginia.

[57] De Francis, *Child Abuse—The Legislative Response,* 44 Den. L. J. 3 (1967). States without a purpose clause are: Alabama, Alaska, Arizona, California, Connecticut, Illinois, Louisiana, Maryland, Massachusetts, Michigan, Missouri, Nebraska, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Wisconsin, and Wyoming.

[58] Technically a minor could be as old as twenty and still be within the jurisdiction of the youth court. Eighteen was probably settled upon because at eighteen a "child" changes to a "minor" by definition under the statutes of Mississippi. Miss. Code Ann. § 7185-02-03 (Supp. 1966).

[59] States in which age limit is under seventeen are: Louisiana, Michigan and Oklahoma; under sixteen: Alabama, Alaska, Arizona, Arkansas, Florida, Illinois, Indiana, Kansas, Maine, Maryland Massachusetts, New Hampshire, New Mexico, New York, North Carolina, South Carolina, Tennessee, Vermont; and under nineteen, Wyoming.

twelve[60] possibly because of a carryover from the common law age of consent. It is submitted that selection of an upper age limit according to the jurisdictional requirements of the youth court is the better method for two reasons. First, there are many children over twelve, but under eighteen, who are incompetent to speak for themselves and second, the youth court is frequently relied upon in the settlement of these types of cases and should be readily available as a remedy to those charged with the duty of reporting, investigating, or solving such cases.

The language in the Mississippi statute which describes when and by whom a report should be submitted reads: "any licensed doctor of medicine, licensed doctor of dentistry, intern, resident, or registered nurse having *reasonable cause* to suspect that a child brought to him or coming before him for examination, care, or treatment is a battered child, shall cause an oral report to be made immediately by telephone or otherwise, followed as soon thereafter as possible by a report in writing. . . ."[61] (emphasis added). This clearly states that the diagnosis of the injury and its cause does not have to be conclusive. The reporter does not have to have actual knowledge of how the injury was incurred. All that is necessary is that there be enough evidence for the reporter to have "a reasonable cause to suspect" that a battery has occurred. One of the problems that might arise from too frequent reporting is that some unnecessary investigations might be made. The broad language should enable the statute to function more effectively by informing reporters that they do not have to wait until they can prove their suspicions before they report. Fourteen other states use exactly the same phrase in their statutes,[62] and nineteen more use the similar phrase "has reason to believe."[63]

For a child to be "Battered" within the purview of the Mississippi statute he must have had serious physical injury inflicted upon him as a result of abuse or neglect by other than accidental means.[64] It would seem, from a survey of the statutes of other states, that this definition is a fairly universal one. Only three states use exactly the same language,[65] but twenty states use "physical injury other than by accidental means,"[66]

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[60] For pertinent statutes see, *Supra* note 35.

[61] MISS. CODE ANN. § 7185-05 (Supp. 1966).

[62] Other states using "reasonable cause to suspect" are: Arkansas, California, Colorado, Connecticut, Florida, Georgia, Kentucky, Louisiana, Maine, New Hampshire, New Jersey, Oregon, South Dakota, and Vermont.

[63] States using "has reason to believe" include: Alaska, Iowa, Kansas, Maryland, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, Ohio, Oklahoma, Rhode Island, Texas, Utah, Vermont, Washington, West Virginia, and Wyoming.

[64] MISS. CODE ANN. § 7185-02 (Supp. 1966).

[65] States using exactly the same language as the Mississippi statute are: Arkansas, Minnesota, and Texas.

[66] States using "other than by accidental means" are: Colorado, Connecticut, Delaware, Florida, Georgia, Indiana, Kentucky, Louisiana, Maine, Missouri, New Hampshire, New Jersey, North Dakota, Oregon, Rhode Island, South Carolina, Vermont, Wisconsin and Wyoming.

and thirteen more use "physical injury as a result of abuse or neglect."[67]

Generally Mississippi's statute does not require that a report be accusatory or identify the perpetrator, but if the reporter has knowledge that might lead to the cause of the injury or the identity of the perpetrator, he is required to include this information in his report.[68] A requirement that this information must be included is much more demanding on the reporter. It brings up ethical implications and makes it more difficult for a doctor to report. Surely it is far more important to have the injury reported than it is to require the reporter to speculate as to the willfulness of the injury or to accuse someone of inflicting it.

> In the last analysis, however, it is more important that the person or institution making the report should not be burdened with the responsibility for evaluating whether the suspected injury was willfully or intentionally inflicted, or to point to the possible offender. The reporting source should be charged only with the responsibility for reporting such injuries which probably are not the result of an accident. After ruling out the probability of accident the reporting source should be free of any other obligation for further diagnosis. All other determinations must be the responsibility of the community resource designated to receive the report and investigate the circumstances in more detail.[69]

Mississippi's statute leaves the way clear for a non-accusatory report to be submitted which helps to eliminate any fears on the part of the reporter, and the immunity clause[70] presumes the good faith of the reporter and exempts him from any civil or criminal liability which might otherwise be incurred or imposed. All forty-eight statutes of other states also allow for some type of immunity[71] which shows the importance of the clause.

Many statutes require only licensed medical doctors to report,[72] but Mississippi includes dentists, interns, residents, and registered nurses and leaves the door open for "any person" to report. This is within the established patterns of other statutes and follows the recommendations of many authorities.[73]

Mississippi requires that an oral report be made immediately, followed by a written one to both the youth court and the county welfare department. This is an excellent provision because it requires notification of the two agencies best able to take action to relieve the situation.

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[67] States using "as a result of abuse or neglect" are: Alabama, Alaska, Idaho, Illinois, Kansas, Nevada, New York, North Carolina, Ohio, Oklahoma, Tennessee, Utah, and West Virginia.

[68] MISS. CODE ANN. § 7185-05 (Supp. 1966).

[69] De Francis, *Child Abuse—The Legislative Response*, 44 DEN. L.J. 3, 18 (1967).

[70] MISS. CODE ANN. § 7185-05 (Supp. 1966).

[71] See, De Francis, 44 DEN. L.J. 3, 17 (1967).

[72] See, Comment, *Legislation as Protection for the Battered Child*, 12 VILL. L. REV. 313, 324.

[73] De Francis, 44 DEN. L.J. 3, 41 (1967).

It is wiser to try to solve the problem by informal means than it is to force the parent or perpetrator to follow a strict pattern of behavior as outlined by a court order. If, for example, the case is taken to court prematurely a mentally disturbed parent or custodian might feel that he has a free reign to further abuse the child if he is acquitted. The statute gives the court the authority to use every method available, social or legal, to solve the problems.[74]

There is no penalty imposed for not reporting by the Mississippi statute. Section 7185-12 says that violations of any court order or failure to comply with the statute is contempt of court and punishable as such, but it appears that this remedy is limited to persons who have not followed the orders of a court after a judgment has been handed down.[75]

About one-half of the states do impose penalties[76] for not reporting, but it is probably not necessary since the "immunity clause" eliminates most of the fear that a reporter might have by granting him immunity from both criminal and civil liability.

Five states have a waiver of privilege clause that uses language similar to that used in the Mississippi clause,[77] twelve waive only the physician-patient privilege,[78] Idaho waives only the husband-wife privilege, fifteen states waive both privileges[79] and fifteen more waive neither privilege.[80] The Mississippi clause provides for a waiver of privileges "similar" to the physician-patient privilege, and this probably is meant to include both the spousal privilege and the parent-child privilege.

From this examination it can be seen that Mississippi has a thorough, well-planned statute. It requires a report from several sources to both the youth court and public welfare department. It provides for solving problems in and out of the courts and the decision as to which method should be used is left to the discretion of the trial judge. The age limit of eighteen is sufficiently high to include most cases where abuses occur. It gives immunity to the reporter from criminal and civil liability and it waives the physician-patient privilege in cases arising from a re-

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[74] MISS. CODE ANN. § 7185-05 (Supp. 1966).

[75] MISS. CODE ANN. § 7185-12 (Supp. 1966). § 7185-13 makes it a misdemeanor to contribute to the neglect, delinquency, or battering of a child.

[76] States with a penalty clause for not reporting are: Alabama, Arizona, Arkansas, Delaware, Florida, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Vermont, Wisconsin, and Wyoming.

[77] States with waiver of privilege clauses similar to Mississippi's are: Kansas, Montana, Nevada, New Mexico, and Oklahoma.

[78] States which waive only the physician-patient privilege are: Arizona, Colorado, Florida, Illinois, Nebraska, North Carolina, Ohio, Pennsylvania, Utah, Washington, and Wyoming.

[79] States which waive both physician-patient and spousal privileges are: Alabama, Alaska, Arkansas, Delaware, Indiana, Iowa, Kentucky, Louisiana, Michigan, Minnesota, Missouri, New Hampshire, North Dakota, Oregon and South Dakota.

[80] States which waive neither the physician-patient privilege nor the spousal privilege are: California, Connecticut, Georgia, Maine, Maryland, Massachusetts, New Jersey, New York, Rhode Island, South Carolina, Tennessee, Texas, Vermont, West Virginia, and Wisconsin.

port. On the whole it is designed to serve the best interest of the child in a flexible manner which can be suited to a wide variety of situations.

To conclude that Mississippi's statute or any of the other statutes will put an end to the problem of child abuse is unrealistic. All the laws are only a beginning. They provide a valuable tool for discovering and identifying any child who has been abused, but this is only the first step in a series to provide the necessary services to treat the problem, provide protection for the child, and preserve the home. Unless this fact is fully understood by officials and citizens alike, communities will probably become complacent, thinking that since the laws are on the books there is little need for further concern about child abuse or neglect.

Vincent De Francis, a noted authority,[81] expresses his feeling on the areas which still require attention in the following manner:

> One area which requires immediate attention is the child protective services. These services are essential to the investigation, diagnosis, and treatment of abused children and their parents. This specialized child welfare service however, is not universally available. A 1955 study revealed many serious local and statewide gaps in the availability of child protective services.
>
> . . . [L]arge gaps still remain. . . .
>
> The lack or inadequacy of present child protective services is usually due to one of the following reasons: (1) the local or state child welfare program lacks a clear legal base for providing child protective services; (2) the legal base is permissive, rather than mandatory, and the appropriating body has failed to allocate funds; (3) there is a legal base, and a child protective program has been initiated; but funds are insufficient to expand services to meet more than a minimal part of the community needs. The obvious conclusion is that legislative action is necessary to authorize and maintain child protective services or to appropriate necessary and sufficient funds if these protective social services are to meet the needs of abused or neglected children.[82]

These problems are very real ones in Mississippi. The state and the various counties and communities must support the creation of such child protective services so that all neglected and abused children can be protected and their parents can be helped to achieve a more adequate and reliable role in society.

It is hoped that this study has provided insight into two important areas which concern children and the law. These are growing problems in our society and need to be dealt with thoroughly and authoritatively when they arise. In the last analysis it is the responsibility of the individual to aid the courts and state agencies in preventing child abuse

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[81] Mr. De Francis has written several important articles concerning child abuse and is the director of the Children's Division of the American Humane Association.

[82] De Francis, 44 DEN. L.J. 3, 40 (1967).

in any form. Denial of medical care to children for religious reasons and purposeful injury or abuse of children are areas in which there are guidelines set forth by the courts and legislature, and these should be understood and used by citizens to assure adequate protection of children in our society.

Guy W. Mitchell, III

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